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# In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 684

WILMER D. REKEWEG,
*Petitioner,*

v.

OHIO STATE BAR ASSOCIATION,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

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# In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. _____.

WILMER D. REKEWEG,
*Petitioner,*

v.

OHIO STATE BAR ASSOCIATION,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio, entered in this cause on April 27, 1966, permanently disbarring him and prohibiting him from practicing law in Ohio courts, and the order of the Supreme Court of Ohio entered in this cause on May 18, 1966, denying petitioner's motion for rehearing of the foregoing disbarment order.

## CITATIONS TO OPINIONS BELOW.

The findings and recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, upon which the judicial orders below are based, is unreported and is printed in Appendix A, *infra,* p. 32.

The opinion and judgment of the Supreme Court of Ohio which ordered petitioner's disbarment, printed in Appendix A, *infra,* p. 31, is reported at 6 Ohio St. 2d 128 (1966).

## JURISDICTION.

The judgment of the Supreme Court of the State of Ohio was entered on April 27, 1966, and petitioner's timely motion for rehearing was denied on May 18, 1966. Upon petitioner's timely applications, the time within which this petition for certiorari might be filed was extended by this Court from August 16, 1966 to September 15, 1966, and then to October 15, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3), since rights, privileges and immunities under the United States Constitution are claimed to have been violated.

## QUESTIONS PRESENTED.

I. Does the permanent disbarment of an attorney upon the recommendation and findings of a hearing board composed of uncompensated attorneys who are members of the prosecuting bar association, and who have backgrounds of activity in enforcing legal ethics, violate the right to a trial by an impartial tribunal as guaranteed by the Sixth Amendment and by the due process and equal protection clauses of the Fourteenth Amendment?

II. Does a disbarment proceeding resulting in the permanent disbarment of an attorney without possibility of reinstatement constitute a criminal trial in which the accused attorney is entitled to the protection of the Sixth and Eighth Amendments as embodied in the due process clause of the Fourteenth Amendment to the United States Constitution?

III. Does the permanent disbarment of an attorney in a proceeding in which the degree of proof of misconduct required to support disbarment, and the quantum of proof of misconduct adduced, are not greater than a mere preponderance of the evidence constitute a denial of due process of the law and equal protection of the laws, as

guaranteed to the accused attorney by the Fourteenth Amendment to the United States Constitution?

IV. Does the permanent disbarment of an attorney on charges of "commingling" funds of decedents' estates with his personal funds, where all of the evidence demonstrates that the alleged commingling consisted of openly made transfers of funds from fiduciary accounts in payment of claimed fiduciary and attorney fees, constitute a denial of due process of law and the right to be informed of the nature and cause of the accusation against him, as guaranteed to the accused attorney by the Sixth and the Fourteenth Amendments to the United States Constitution?

V. Does the permanent disbarment of an attorney on charges of embezzlement in violation of a state statute which prohibits only secretive defalcations, where all of the evidence demonstrates that the transfers in question were openly made, constitute a denial of due process of law and the right to be informed of the nature and cause of the accusation against him, as guaranteed to such attorney by the Sixth and the Fourteenth Amendments to the United States Constitution?

VI. In disbarment proceedings initiated by a bar association and resulting in the permanent disbarment of an attorney, does failure to apprise the accused attorney of the identity of the complainants who caused the initiation of the proceedings constitute a violation of such attorney's right to confront his accusers as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution?

VII. Does permanent disbarment without possibility of reinstatement, imposed upon an attorney as punishment for a first offense consisting of commingling or misappropriating funds of decedents' estates with his personal funds

by making unconcealed transfers of such funds to his personal account, constitute a cruel and unusual punishment as prohibited by the Eighth and Fourteenth Amendments to the United States Constitution?

## CONSTITUTION, STATUTES AND RULES.

The relevant statutes, O. R. C. §§ 2907.34 and 2945.04, together with Rules XVIII and XIX of the Supreme Court of Ohio, are set forth in Appendix B hereto. The relevant provisions of the Federal Constitution, Amendments VI, VIII and XIV, are set forth in Appendix C.

## STATEMENT.

This case involves the permanent disbarment of the petitioner ("respondent" in the proceedings below), a 52 year old lawyer who had been engaged in the general practice of law in the rural Ohio county of Paulding for about 27 years (R. 154).[1] Petitioner was an extremely energetic (R. 142), active (R. 121-23) and vigorous advocate (R. 143), who had many loyal clients (R. 132), including many of the poor and underprivileged members of his community (R. 141). There is no record of prior disciplinary proceedings against the petitioner.

On October 4, 1964, a complaint was initiated against the petitioner by the Ohio State Bar Association ("relator" in the proceedings below) setting forth eight specifications or counts of claimed misuse of the funds of four decedents' estates in which he had been the fiduciary and attorney. These specifications charged the petitioner with "commingling" in violation of Canon 11 of the Canons of Professional

[1] References designated with the prefix "R" refer to pages in the transcript of the proceedings before a panel of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio.

Ethics of the American Bar Association,[2] and also charged him with commission of a felony involving moral turpitude by violating Section 2907.34 of the Ohio Revised Code.[3] That statute essentially prohibits embezzlement.

Pursuant to the Ohio Supreme Court's Rule XVIII (reproduced at pp. 43-59, *infra*, and hereinafter sometimes called Rule XVIII), the complaint was heard by a panel of three members of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio (hereinafter called the "Board"). Members of the Board are members of the Bar of the Ohio Supreme Court appointed by the Ohio Supreme Court. Rule XVIII(1). In this instance the members included attorneys from widely scattered parts of Ohio (R. 2). Each member of the panel has a biographical entry in the 1966 edition of Martindale-Hubbell Law Directory.[4] These entries disclose that each member of the panel was a member of the Ohio State Bar Association. One of the panel members was the president of the Ohio Bar Association Foundation beginning in 1961, and Vice President of the Ohio Legal Center from 1961 through 1964. Another served as chairman of the Ethics Committee of the Cincinnati Bar Association in 1956, as Vice President of the Cincinnati Bar Association from 1953 to 1957, and as its President in 1957 and 1958.

The hearing took place in the offices of the Toledo Bar Association (R. 1).

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[2] Adopted by the Supreme Court of Ohio in Rule XIX of its Rules of Practice reproduced at pp. 59-60, *infra*.

[3] Reproduced at p. 42, *infra*.

[4] The affiliations and offices described in this paragraph are disclosed in III Martindale-Hubbell Law Directory (1966) at the following pages:

John H. Py, p. 334B.
Fred A. Smith, pp. 348B-349B.
Robert F. Dreidame, pp. 98B-99B.

The Bar Association, for its case in chief, placed in evidence the probate court records of the estate in question (R. 22-31, 69-73, 79, 108, 117, 369; Relator's Exh. 1-4A, inclusive), and ledger sheets and deposit slips of the petitioner's estate bank accounts and personal checking account (R. 74-76, 79-81, 84, 89-100, Relator's Exh. 5-11, inclusive). The relator also introduced testimony (denied by the petitioner) that petitioner had admitted having misused estate funds (R. 115).

While this evidence demonstrated discrepancies in the probate and bank accounts in question, the Bar Association presented no evidence of any improper use to which the petitioner put any of the funds, nor did the relator's witnesses suggest any dishonesty or evasive behavior on petitioner's part. No dissatisfied heirs, legatees or other clients were called upon to testify against the petitioner.

Petitioner, taking the stand in his defense, explained that in each case the funds withdrawn from the estate account were taken by him as fiduciary or attorney fees (R. 155, 164, 165, 168, 300-302, 308, 309, 311, 320). He described the extensive and valuable services which he had rendered to earn these sums (R. 156, 163-64, 172-73, 300-302). The only withdrawal of funds which he did not claim as a fee was an amount which he had received from an illiterate client to pay debts (R. 167). The debts were, in fact, paid by the petitioner (Relator's Exh. 4, Final Account).

Denying that he had admitted having misused funds, petitioner explained that he had merely agreed to return a portion of his fee which the probate judge had regarded as excessive, but had not admitted to any improper conduct (R. 161).[5]

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[5] The only third person to overhear this conversation was a hostile attorney who had filed a motion to remove petitioner as a fiduciary in one of the estates, and who acknowledged that the amount to be returned had been claimed as a fee (R. 325).

In addition to his own testimony petitioner was supported by the testimony of satisfied probate clients (R. 133-34, 282-86), including a daughter of one of the decedents whose estate was involved in these proceedings (R. 133-34). Petitioner's character and the quality of his services were attested by the judge of the Common Pleas Court of Paulding County (R. 135-44).

Under questioning of petitioner's counsel, the probate judge of Paulding County testified that during the period in question, it was unnecessary for attorneys to make application for attorneys fees (R. 121). In case of ordinary fees, the attorney would pay himself, and the account would be approved if there was no objection (R. 121). Even in cases of extraordinary fees, the attorney might simply "discuss extraordinary fees with the judge" (R. 121).

No rebuttal testimony whatever was offered to contradict the petitioner's statements as to the nature and extent of his services for which he claimed compensation. Nevertheless, the panel resolved all doubts against the petitioner and found him guilty of six of the charges, recommending permanent disbarment. The Board confirmed the findings and recommendation of the panel.

On April 27, 1966, the Supreme Court of Ohio issued its *per curiam* opinion and decision.[6] The Court noted the Board's finding of disparity between the amounts transferred and the total value of the estates, held that "the findings of the Board are supported by the evidence," and rendered judgment permanently disbarring the respondent from the practice of law. An attorney thus disbarred can never be reinstated.[7] Petitioner's motion for rehearing was denied on May 18, 1966. It is from these orders that relief is sought by this petition for a writ of certiorari.

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[6] Reproduced at p. 32, *infra*.

[7] Ohio Supreme Court Rule XVIII (7).

## REASONS FOR GRANTING THE WRIT.

**I. Petitioner was denied a trial before an impartial tribunal.**

This Court has had recent occasion to reaffirm dramatically the central importance of an unbiased tribunal to due process of law.[8] The tribunal which tried petitioner's case was composed of prominent attorneys, long concerned with enforcing legal ethics and associated with the bar association which prosecuted him, who regularly volunteered their ordinarily expensive services, traveling about the state to assess the conduct of their colleagues.

Each of the panelists was a member of the Ohio State Bar Association, one also being a high officer of the Ohio Bar Association Foundation and a recent vice president of the related Ohio Legal Center, while another was the chairman of his local bar association's ethics committee.[9] The Ohio State Bar Association was the relator and, in effect, the prosecutor. Thus, the petitioner was prosecuted and tried by bar association personnel.

In *Re Heirich,*[10] the Illinois Supreme Court held that a commissioner in a disbarment proceeding who was a member of a law firm which represented certain railroads which were members of an association which financed the investigations culminating in the disbarment proceedings was disqualified by his conflict of interest.

The relationship between the Bar Association and the panel which tried Rekeweg was much more direct and invidiously prejudicial than the relationship which was

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[8] *Sheppard v. Maxwell,* 384 U. S. 333 (1966).

[9] See Statement, *supra,* p. 5.

[10] 10 Ill. 2d 357, 140 N. E. 2d 825, 67 A. L. R. 2d 827 (1956), cert. denied 355 U. S. 805 (1957).

fatal to the *Heirich* proceedings. The bar association here did not merely investigate the case, it prosecuted Rekeweg before the Board. The panelists were not merely representatives of members of the association, they were themselves members of the prosecuting association and officers of related organizations. This kind of identity between the judge and prosecutor approaches that which was condemned in *Re Murchison*, 349 U. S. 133 (1955), in which the Court, striking down a contempt citation issued by a judge in his capacity as a "one-man grand jury," said:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." *Id.* at 136. See also *Re Oliver*, 333 U. S. 257 (1948).

The panel which tried the petitioner was also tainted by the fact that its participants, busy professionals, served without compensation.

In *Tumey v. Ohio*, 273 U. S. 510 (1927) this Court said that:

> "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." *Id.* at 532.

Even if the necessity of traveling around the state[11] and participating in a lengthy hearing with no more than reimbursement for expenses, were not calculated to arouse resentment against the attorney who had occasioned such discomfort, the tendency of such an arrangement to be a

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[11] Rule XVIII (10) precludes a commissioner from hearing a case arising in the district in which he resides.

"possible temptation to the average man as a judge" to hasten his consideration of the testimony is inevitable.

Finally, whether or not the panelists who tried Rekeweg were consciously biased, the attitudes, motivations and points of view of members of a board of commissioners on grievances who hold high offices in bar associations (see p. 5, *supra*), and who have voluntarily involved themselves in efforts to clean up the bar (*ibid.*) cannot be as fresh and even-handed as those of either a jury selected at random, or a professional judge who sits on a variety of cases, and for a living rather than an avocation. It seems beyond question that in a murder trial, a jury composed entirely of persons who had asked for the opportunity to serve on the jury could hardly be regarded as an appropriate panel. True, this Court has upheld the validity of certain "blue-ribbon" juries. However, as four justices noted in dissent, in *Fay v. New York:*[12]

> "[T]here is a constitutional right to a jury drawn from a group which represents a cross-section of the community. And a cross-section of the community includes persons with varying degrees of training and intelligence and with varying economic and social positions. Under our Constitution, the jury is not to be made the representative of the most intelligent, the most wealthy or the most successful, nor of the least intelligent, the least wealthy or the least successful. It is a democratic institution, representative of all qualified classes of people * * *. To the extent that a 'blue ribbon' panel fails to reflect this democratic principle, it is constitutionally defective."

A review of this case would provide this Court an opportunity to overrule the doctrine of *Fay v. New York*[13]

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[12] 332 U. S. 261, 299-300 (1947) (dissenting opinion).

[13] *Ibid.*

or to limit its application so as to invalidate the adjudication of professional disciplinary proceedings by prominent professional volunteers.

The importance of an unbiased board to a fair proceeding under the Ohio Supreme Court's practices cannot be over-estimated. The board not only makes findings which characterize the evidence, it makes a recommendation. In this case, the ultimate decision of the court was that "[t]he findings of the board are supported by the evidence and its recommendation is warranted." This is not the language of a court which has taken an *independent* look at the transcript. To the contrary, this is the language of appellate affirmance. Even without such language, it could not be assumed that the recommendation of the board was without significant weight. But in view of the court's cursory acceptance of the board's recommendation, an unbiased board becomes essential to a fair disbarment proceeding in Ohio.

The Ohio procedure reflects a modern tendency to employ bar associations and boards of commissioners in an integrated disciplinary system.[14]

This Court has required the states to afford fair hearings in civil trials as well as criminal.[15] Thus, while elsewhere in this petition for a writ of certiorari, petitioner will urge that a disbarment proceeding is criminal for

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[14] The amalgamation of bar associations, grievance committees and boards of commissioners into a disciplinary system capable of hearing disbarment proceedings and recommending or even decreeing disbarment before any judge intervenes is increasingly a modern phenomenon in America. See discussion in Potts, *Disbarment Procedures*, 24 Tex. L. Rev. 161, 175-78 (1946).

[15] "When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality." *Wong Yang Sung v. McGrath*, 339 U. S. 33 (1950).

constitutional purposes,[16] such a ruling is unnecessary to the grant of review on this point.

Review of petitioner's disbarment would provide an opportunity to establish standards for the independence and fairness of boards of commissioners as they function in modern disciplinary proceedings, so that the admonition of this Court that:

> "A state cannot exclude a person from the practice of law * * * in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment * * *."[17]

will not be ignored.

**II. This Court should apply the constitutional protections applicable in criminal trials to proceedings for permanent disbarment.**

It seems elementary that a legal proceeding which is initiated by authority of an arm of the State[18] against an accused for acts which are criminal in character and which, if proved, will result in an adjudication of "guilty" and the punishment of the accused by permanently depriving him of valuable property, bears a striking similarity to a criminal proceeding. As Mr. Justice Black has pointed out in discussing a denial of admission to the bar[19] in *Konigs-*

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[16] Section II, *infra*, at pp. 12-15.

[17] *Schware v. Board of Bar Examiners*, 353 U. S. 232, 238-39 (1957).

[18] The Bar Associations are specifically charged with the duty to prosecute disciplinary proceedings by Rule XVIII (4).

[19] See Mr. Justice Harlan, speaking for the Court in *Cohen v. Hurley*, 366 U. S. 117, 123 (1961):

> "The fact that such refusal was here made a ground for *disbarment*, rather than for *denial of admission to the bar* * * * is not of constitutional moment." (Emphasis added.)

*berg v. State Bar of California*, 353 U. S. 252, 257-258 (1957):

> "While this is not a criminal case, its consequences for Konigsberg take it out of the ordinary run of civil cases. The Committee's action prevents him from earning a living by practicing law. This deprivation has grave consequences for a man who has spent years of study and a great deal of money in preparing to be a lawyer."

The severe consequences of disbarment have long been recognized[20] and recently clearly and eloquently described by Mr. Justice Black:

> "It is beyond dispute that one of the important ends served by the practice of law is that it provides a means of livelihood for the lawyer and those dependent upon him for support. That means of earning a livelihood is not one that has been conferred upon the lawyer as a gift from the State. Quite the contrary, it represents a substantial investment in time, money and energy on the part of the person who prepares himself to go into the legal profession. Moreover, even after a lawyer has been admitted to practice, a further substantial investment must be made to enable the lawyer to build up the sort of good will that lies at the root of any successful practice. Young lawyers must and do take on cases in which their ultimate fee is only a fraction of the real value of the work they put

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[20] See *Hudson v. Slade*, 3 Foster and Finlason (Q.B.) 390, 411 (1862):

> "* * * short of those heavy consequences that would attach to the greater and more heinous offences, I own I can conceive of no jurisdiction more serious than that by which a man may be deprived of his degree and status as a barrister, and which, in such a case—perhaps, after he has devoted the best years of his life to this arduous profession,—deprives him of his position as a member of that profession, and throws him back upon the world to commence a new career as best he may, stamped with dishonour and disgrace."

into the case in order to build up this sort of goodwill. The lawyer's abilities, acquired through long and expensive education, and the goodwill attached to his practice, acquired in part through uncompensated services, are capital assets that belong to the lawyer—both as a lawyer and as a man, assuming that such a conceptualistic distinction can be drawn.

"These assets should be no more subject to confiscation than his home or any other asset he may have acquired through his industry and initiative. If they are used in violation of an already-existing clear requirement of the law which pronounces as a penalty for violation confiscation of the assets, and if the violation is established in a proceeding in which all the requirements of the 'law of the land' are satisfied, that is one thing. But to confiscate the earning capacity that represents a large part of a lawyer's lifetime achievements on the theory that no such asset exists is quite another. The theory that the practice of law is nothing more than a privilege conferred by the State which it can destroy whenever it can assert a 'reasonable' justification for doing so seems to me to permit plain confiscation.

"Even apart from the financial impact, the disbarment of a lawyer cannot help but have a tremendous effect upon that lawyer as a man. The dishonor occasioned by an official pronouncement that a man is no longer fit to follow his chosen profession cannot well be ignored. Such dishonor undoubtedly goes far toward destroying the reputation of the man upon whom it is heaped in the community in which he lives. And the suffering that results falls not only upon the disbarred lawyer but upon his family as well. Government certainly should not be allowed to do this to a man without according him the full benefit of the 'law of the land,' both constitutional and statutory."

*Cohen v. Hurley*, 366 U. S. 117, 145-147 (dissenting opinion).

Little wonder it is, then, that this Court has clearly announced that "[a] State cannot exclude a person from the practice of law * * * in a manner or for reasons that contravene the Due Process * * * Clause of the Fourteenth Amendment." *Schware v. Board of Bar Examiners of New Mexico*, 353 U. S. 232, 238-239 (1957).

To the extent that *Cohen v. Hurley*, 366 U. S. 117, 126 (1961) appears to suggest a different emphasis, it must be remembered that only the availability of state constitutional rights in a state disciplinary proceeding were there involved.[21]

Whether it be deemed a "right" or a "privilege," "[c]ertainly the practice of law is not a matter of the State's grace" [22] and disbarment proceedings involve risk of such substantial penalties and bear such a close resemblance to accusatorial criminal procedure as to require at least strict compliance with criminal due process standards.

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[21] See Mr. Justice Harlan's language for the Court in *Cohen v. Hurley*, 366 U. S. 117, 127-128 (1961):

"* * * it is suggested that the 14th Amendment gave petitioner a *federal* constitutional right not to be required to incriminate himself in the state proceedings * * *. That proposition, however, was explicitly rejected by this Court, upon the fullest consideration, more than fifty years ago, *Twining v. New Jersey*, 211 U. S. 78 * * * and such has been the position of the Court ever since." But *cf. Malloy v. Hogan*, 378 U. S. 1, 84 S. Ct. 1489 (1964), overruling *Twining v. New Jersey*, *supra*.

[22] *Schware v. Board of Bar Examiners of the State of New Mexico*, 353 U. S. 232, 239, fn. 5 (1957); *Ex parte Garland*, 4 Wall. 333, 379 (1866).

**III. The disbarment of petitioner under a standard of proof of misconduct not greater than by a preponderance of the evidence violated equal protection and due process requirements of the Fourteenth Amendment.**

The rules of the Ohio Supreme Court are silent as to the burden or degree of proof in disbarment proceedings. Nor do the findings or opinion below indicate the standard which was in fact applied in this case.[23] However, the Ohio Supreme Court has held that "the degree of proof required in a disbarment proceeding is a preponderance of the evidence." [24]

If petitioner had been tried criminally under the same embezzlement statute,[25] he would have been entitled to proof of guilt beyond a reasonable doubt.[26] The maximum penalty provided by that statute is imprisonment for ten years. Who is to say whether such imprisonment would be harsher to a man in Rekeweg's position than permanent deprival of his livelihood and way of life? There is no reasonable classification which justifies treating attorneys charged with embezzlement differently than non-lawyers. "Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand in equality before the bar of justice in every American court.' " [27]

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[23] The court's opinion that the findings of the board are "supported by the evidence" and its recommendation "warranted" suggest that the court, in reviewing the findings, was looking only for something like "substantial evidence" rather than even a preponderance.

[24] *Mahoning County Bar Association v. Ruffalo*, 176 Ohio St. 263, 199 N. E. 2d 396 (1964), cert. den. 379 U. S. 931 (1964); *Re Lieberman*, 163 Ohio St. 35, 125 N. E. 2d 328 (1955).

[25] Ohio Revised Code, § 2907.34.

[26] Ohio Revised Code, § 2945.04.

[27] *Griffin v. Illinois*, 351 U. S. 12, 17 (1956).

There are due process considerations as well. It is "a violation of due process to convict and punish a man without evidence of his guilt." *Thompson v. Louisville*, 362 U. S. 199, 206 (1960). This principle was extended to bar applicants in *Schware v. Board of Bar Examiners*, 353 U. S. 232 (1957). Guilt of a crime has always meant guilt beyond a reasonable doubt. This disbarment proceeding sufficiently resembles criminal prosecution to require a similar standard. It is unthinkable that a state should be permitted to reduce the required degree of proof of guilt in criminal cases to mere "preponderance of the evidence."

**IV. Conviction of "commingling" fiduciary funds upon proof of unconcealed transfers under claim of right deprived petitioner of due process of law and the right to be informed of the nature and cause of the accusation against him.**

The portion of Canon 11 which prohibits commingling in effect restates the ordinary fiduciary duty with respect to clients' funds and trust properties. It provides, in pertinent part, that:

> "Money of the client or collected for the client or other trust property coming into the possession of the lawyer should be reported and accounted for promptly, *and should not under any circumstances be commingled with his own or be used by him.*" (Emphasis supplied.)

Petitioner was not charged with taking excessive fees,[28] nor was he charged with failing to make proper application for such fees. Even assuming, *arguendo*, that the record could support a case on either of such charges, the principle declared by this Court is that "[c]onviction

[28] Excessive charges is not a ground for disciplinary action against a lawyer under Ohio law. *Cf. Re McCray*, 1 Ohio App. 421 (Ashland 1913).

upon a charge not made would be sheer denial of due process." [29] Accordingly, the validity of the disbarment must stand or fall on whether "commingling," as charged, was proved.

The obvious purpose of the proscription against "commingling" contained in Canon 11 is to establish the fiduciary duty to separate trust funds from personal funds as a legal ethic. Ohio, of course, recognizes the obligation of a fiduciary to avoid commingling trust funds.[30] Obviously, if a trustee or administrator claims an amount to which he is not entitled, he is liable to return it to the trust estate, however innocent his motives and however earnest his claim of right. However, where an administrator makes an improper disposition of estate funds in the belief that such disposition is justified, Ohio courts have held that such conduct is not "criminal or quasi-criminal." [31] Accordingly, a conviction of commingling based entirely upon proof of transfers under claim of right must be regarded as based upon no proof of guilt.

In *Schware v. Board of Bar Examiners,*[32] this Court held that even where exclusion from the practice of law is based upon permissible standards:

> "officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards * * *." *Id.* at 239. See also *Thompson v. Louisville,* 362 U. S. 199, 206 (1960).

On the other hand, if the Ohio concept of commingling is to be regarded as having been broadened to cover the

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[29] *DeJonge v. Oregon,* 299 U. S. 353, 362 (1937).

[30] *Smith v. Fuller,* 86 Ohio St. 57, 99 N. E. 214 (1912).

[31] *Re Estate of Johnson,* 38 Ohio L. Abs. 372, 375, 50 N. E. 2d 273 (Cuyahoga Ct. App. 1943). Motion to certify to Ohio Supreme Court overruled May 12, 1943.

[32] 353 U. S. 232 (1957).

petitioner by reason of the decision of the Ohio Supreme Court in this case, then petitioner has not been adequately informed of the nature of the charge against him. This requirement, as explicitly contained in the Sixth Amendment, requires that the accused must be put in such a position that he may "meet the accusation and prepare for his trial * * *." *Bartell v. United States*, 227 U. S. 427, 431 (1913).[33] And, where the general nature of the charge is a vaguely defined concept, the detailed specification of the conduct charged will not cure the constitutional defect.

> "If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it." [34]

Prior to his having been found guilty, there was no way in which the petitioner could have known that the unconcealed character of his conduct and his claim of right were not defenses to the charge of commingling. As this Court noted in *Lanzetta v. New Jersey*,[35]

> "[i]t would be hard to hold that, in advance of judicial utterance upon the subject, [petitioners] were bound to understand the challenged provision according to the language later used by the court."

Review of this case is essential to establish the necessity for adherence to the requirements that evidence be adduced to support the charge, and that the accused be apprised of the nature of the offense, in criminal or quasi-criminal disbarment proceedings. In view of the inherent

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[33] See also *United States v. Cruikshank*, 92 U. S. 542, 544, 558 (1875). This requirement is binding upon the states as a part of due process of law. *Lanzetta v. New Jersey*, 306 U. S. 451, 453 (1939).

[34] *Ibid. cf. United States v. Reese*, 92 U. S. 214, 221 (1875).

[35] 306 U. S. 451, 456 (1939).

vagueness of the canons of professional ethics,[36] this case presents an important occasion for clarifying the responsibility of the states to disbar attorneys only upon proof of clearly defined offenses.

**V. Conviction of embezzlement of fiduciary funds upon proof of having made unconcealed transfers under claim of right deprived the petitioner of due process of law and the right to be informed of the nature and cause of the accusation against him.**

In addition to "commingling" as prohibited by Canon 11, Rekeweg's conduct was found to constitute embezzlement as proscribed by § 2907.34 of the Ohio Revised Code. The same constitutional deficiencies discussed above with respect to commingling are even more flagrantly evident in the embezzlement charge.

The statute in question provides, in pertinent part, as follows:

> "No officer, attorney at law, agent, clerk, guardian, executor, executrix, administrator, administratrix, trustee, assignee in insolvency, receiver, officer of a lodge or subordinate body of a fraternal or mutual benefit society, servant, or employee of a person, except apprentices or persons under eighteen years of age, shall embezzle or convert to his own use, fraudulently take or make away with, or secrete with intent to embezzle or convert to his own use anything of value which comes into his possession by virtue of

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[36] Even a hasty perusal of the canons demonstrates that they are inherently vague and intended to supply goals of model conduct, rather than precise minimum standards. Imagine a prosecution for violation of the following language from Canon 11:

> "The lawyer should refrain from any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client."

his election, appointment, or employment thereto. * * *"

Under Ohio law, conviction of this crime requires a showing of specific intent.[37] Accordingly, it has been unequivocally held that a fiduciary cannot be charged with embezzling funds which he has retained under claim of right as compensation, even if later disallowed.[38] The case which so held, bears the imprimatur of the highest court of Ohio, and reversed a conviction for failure to give the following requested jury instruction:

> "The court instructs you that if the defendant has not concealed the receipt of the money alleged to have been embezzled, but has claimed in good faith to keep it under some right as against the owner, then he is not guilty of embezzlement, and your verdict should not be guilty." [39]

While the panelists chose to disregard the petitioner's claim of right, there was *no* evidence to support their out-of-hand rejection of this explanation. There was no concealment of any transfer. In no case was the fee claimed shown to be unreasonable in view of the amount of the petitioner's efforts. For example, in case of the third specification, petitioner was charged with taking $4,750.00 as a combined attorney and fiduciary fee in an estate which included a $35,000.00 wrongful death settlement obtained by him. Including his fee for recovering the settlement, he received less than $13,000.00 as aggregate fees in connection with this estate. The Board, in rejecting petitioner's claimed right of compensation, excluded the wrongful death settlement as an asset for purposes of

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[37] *State v. Huffman,* 131 Ohio St. 27, 1 N. E. 2d 313 (1936).

[38] *Shelley v. State,* 19 Ohio Cir. Ct. (N. S.) 164 (Medina Cir. 1911), affirmed 85 Ohio St. 481, 98 N. E. 1134 (1912).

[39] *Id.* at 19 Ohio Cir. Ct. (N. S.) 168.

computing the attorney and fiduciary fees for administering the estate.[40] Irrespective of the technical merit of that exclusion as a matter of probate accounting, it is hardly a basis upon which permanently to deprive an attorney of his livelihood. The right to practice law is "a right of which he can only be deprived by the judgment of the court for moral or professional delinquency." *Ex Parte Garland*, 71 U. S. 333, 379 (1866).

Under this posture of Ohio law, the analysis made in the preceding section regarding commingling applies with even greater force to the charge of embezzlement. There was no evidence to support a charge of embezzlement,[41] and therefore, a conviction on such a charge violates due process requirements.[42] On the other hand, if the state law of embezzlement is to be regarded as having been extended to cover his conduct by the decision below, then petitioner has been denied his right to be informed of the nature and cause of the accusation against him.[43]

For the reasons expressed above, this issue, like the preceding one, requires review by this Court to clarify the responsibility of the states to disbar attorneys only upon proof of clearly defined offenses.

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[40] Findings and Recommendation of the Board, *infra*, pp. 35-36 (Third Count).

[41] Since it cannot be assumed that the Ohio Supreme Court would have ordered the most severe penalty if any of the six specifications in question had been dismissed, the lack of proof regarding the wrongful death settlement alone justifies review and reversal by this Court.

[42] *Thompson v. Louisville*, 362 U. S. 199 (1960).

[43] *Lanzetta v. New Jersey*, 306 U. S. 451 (1939).

**VI. Failure to inform petitioner of the identity of the persons who complained against him violated his confrontation and due process rights.**

The Court has acknowledged that "the privilege to confront one's accusers" was guaranteed by the Fourteenth Amendment,[44] and that as regards the right to practice law, "procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood." [45] The petitioner was never provided with the opportunity, by preliminary hearing or otherwise, to learn who his accusers were.

It is true that for historical or statutory considerations, and for the purposes of encouraging cooperation with law enforcement officers and protecting innocent persons during investigations, this Court has preserved exceptions to the right of confrontation in connection with grand jury proceedings.[46] However, such exceptions have not generally been extended to other accusatory procedures. Even the nameless police informer must be unmasked where his identity is "relevant and helpful to the defense of an accused, or * * * essential to a fair determination of a cause * * *." *Roviaro v. United States*, 353 U. S. 53, 60-61 (1957). Thus, dealing with the right of confrontation in proceedings for admissions to the bar, this Court has acknowledged that "the requirements of fairness are not exhausted in the taking or consideration of evidence but

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[44] *Pointer v. Texas*, 380 U. S. 400 (1965); *Snyder v. Massachusetts*, 291 U. S. 97, 106 (1934).

[45] *Willner v. Committee on Character and Fitness*, 373 U. S. 96, 103 (1963), see also *Greene v. McElroy*, 360 U. S. 474, 492 (1959).

[46] See *Wilson v. United States*, 221 U. S. 361, 375 (1911); *Hale v. Henkel*, 201 U. S. 43, 59 (concurring opinion 1906); *Re Oliver*, 333 U. S. 257, 264 (1948).

extend to the * * * beginning and intermediate steps." [47] In *Roviaro,* the accused was in the fortunate position of knowing what role his nameless accuser had played in his arrest for narcotics violations. Roviaro was thus able to demonstrate and explain his particular need for the informer's identity in the preparation of his defense. However, the person in the petitioner's position—who has no inkling as to who among the many persons involved in his affairs instigated the case against him—has even greater need for the identity of his accusers. For he has no way of knowing whether or how his accusers might be made to yield evidence on his behalf.

In disbarment proceedings where none of the historical reasons of fear of violent reprisal[48] that have sometimes been urged as reasons for limiting confrontation rights in grand jury proceedings are present, the *Roviaro* formula is both unsatisfactory and unnecessary. The accused attorney should have the right to determine for himself whether the accuser can be examined to his benefit. He cannot make such a decision unless he is furnished the identity of that accuser. This Court should grant a writ of certiorari to review Ohio's failure to afford petitioner knowledge of the identity of the complainants in his case, and to establish a rule that a fair accusatory procedure which assures the right of confrontation must be observed by the states in proceedings for permanent disbarment.

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[47] *Willner v. Committee on Character and Fitness,* 373 U. S. 96, 105 (1963).

[48] *Cf. Hale v. Henkel,* 201 U. S. 43, 58-66 (1906).

**VII. Whether permanent disbarment without possibility of reinstatement constitutes a cruel and unusual punishment as applied to the petitioner.**

By virtue of the Ohio Supreme Court's rule,[49] unless this Court reverses the decision below, Rekeweg "shall never * * * be readmitted to the practice of law in this State." Surely such a penalty is "punishment" within the meaning of the Eighth Amendment's prohibition of cruel and unusual punishments. This Court looks beyond whether a law is technically "penal" or "non penal" and applies the Eighth Amendment to any law which imposes a "consequence that will befall one who fails to abide by * * * regulatory provisions * * *,"[50] or which "imposes" a "sanction * * * for the purpose of punishing transgression of a standard."[51] However, no great perspicacity is necessary to find punishment in this case. The petitioner is being disbarred for conduct which, it is claimed, violates an Ohio criminal statute and a code of behavior for lawyers. Disbarment is referred to as a form of "discipline"[52] in the Ohio Supreme Court's rules, and those rules enjoin the court and other enforcing bodies to vary the severity of the discipline "depending upon the seriousness of * * * [the] misconduct." To apply the kind of analogy this Court made in *Trop v. Dulles*,[53] with regard to denationalization as a consequence of desertion, if the petitioner had been sent to prison for embezzlement, he would certainly have been subjected to punishment. Upon substitution of the deprivation of his livelihood for imprisonment, "it cannot fairly be said that the use of this

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[49] Rule XVIII (7).

[50] *Trop v. Dulles*, 356 U. S. 86, 97 (1958).

[51] *Id.* at 97-98.

[52] Rule XVIII.

[53] 356 U. S. 86, 97 (1958).

particular sanction transforms the fundamental nature" [54] of the regulation. As this Court said in *Ex Parte Garland*, 4 Wall. 333 (1866), "[E]xclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct." *Id.* at 377.

Any non-penal characteristics which may be assigned to less severe forms of discipline have no application to permanent disbarment. The suspension of an attorney until such time as he may convince a board of examiners that he has acquired the qualifications of character necessary to the practice of law is, in addition to punishment, a measure which is reasonably related to the legitimate purpose of ridding the bar of unethical practitioners.[55] However, the obvious purpose of a rule which, in effect, says that no matter how thoroughly and evidently the disbarred lawyer may have reformed, he may *never* again practice law, is entirely penal.

Permanent disbarment being punishment—and severe punishment, indeed—petitioner urges this Court to review his case for a determination that such punishment is "cruel and unusual" within the meaning of the Eighth and Fourteenth Amendments. A punishment is cruel and unusual when it is disproportionately severe in relation to the offense.[56] Thus, twelve years of imprisonment at hard and painful labor in chains was held to be cruel and unusual

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[54] *Ibid.*

[55] Such indefinite suspension is an alternative form of discipline available under Rule XVIII, and no guide is furnished as to the conditions which should govern the selection of individuals for the irrevocable penalty.

[56] *Weems v. United States*, 217 U. S. 349, 368 (1910). See also *Robinson v. California*, 370 U. S. 660, 667 (1962) in which the court said "Even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold."

as punishment for falsification of public records in *Weems v. United States.*[57] In that case, this Court refused to limit the application of the law to historically barbaric punishments, and said that:

> "Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth." [58]

One of the factors which led the Court to hold that such a penalty was disproportionately severe was that it was imposed for the crime of merely falsifying records, whether or not the accused did the proscribed act fraudulently, or with intent to injure, or for personal gain.[59] This potential for innocent infraction is precisely present in the eleventh canon's injunction that "trust property coming into the possession of the lawyer * * * should not be under any circumstances commingled with his own * * *." Like the falsification statute considered by this Court in *Weems,* this Canon makes no distinction, by its terms, between the most innocent and the most aggravated kinds of proscribed misconduct, and is capable of reaching acts which are by no means evidence of an evil or dishonest motive—such as retention of funds by mistake, innocent failure to keep a proper trust account, or retention of funds under a claim of right. As applied to an unaggravated case of commingling by a first offender, this ultimate penalty offends the proper balance between

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[57] 217 U. S. 349, 368 (1910).

[58] *Id.* at 373.

[59] *Weems v. United States,* 217 U. S. 349, 363 (1910).

seriousness of misconduct and severity of punishment in disbarment cases—a balance prescribed by Justice Field, in 1872, as follows:

> "[The power of removal from the bar] is a power which should only be exercised for the most weighty reasons, such as would render the continuance of the attorney in practice incompatible with a proper respect of the court for itself, or a proper regard for the integrity of the profession * * *. Admission as an attorney is not obtained without years of labor and study. The office which the party thus acquires is one of value, and often becomes the source of great honor and emolument to its possessor. To most persons who enter the profession, it is the means of support to themselves and their families. To deprive one of an office of this character would often be to decree poverty to himself and destitution to his family. *A removal from the bar should therefore never be decreed where any punishment less severe—such as reprimand, temporary suspension, or fine—would accomplish the end desired.*" (Emphasis supplied)[60]

There is nothing in the record to suggest that a lesser penalty, if any, would not have sufficed to accomplish any legitimate end of punishment in view of the lack of any aggravating circumstances, the lack of prior offenses and the isolated nature of the incidents which gave rise to these proceedings, as well as of the amorphous nature of the concept of "commingling" with which the petitioner was charged. There was no legitimate governmental purpose served[61] by sentencing petitioner to a lifetime separation from his arduously acquired livelihood under a decree

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[60] *Bradley v. Fisher*, 13 Wall. 335, 20 L. Ed. 646, 651-52 (1872).

[61] *Cf. Atlantic Coast Line R. R. Co. v. Goldsboro*, 232 U. S. 548, 558 (1914); *Louis K. Liggett Co. v. Baldridge*, 278 U. S. 105, 111-112 (1928).

which can never be ameliorated in the slightest degree. So severe a punishment under these circumstances is cruel and unusual in every sense. Therefore, this decision provides an occasion for review by this Court for the purpose of applying the strictures of the Eighth and Fourteenth Amendments to disciplinary proceedings resulting in permanent disbarment.

## CONCLUSION.

In recent years this Court has found it necessary to remind the states that in their efforts to police the legal profession—however worthy their motives and however strong their legitimate interests—they may not infringe upon the constitutional rights of the lawyer to engage in his profession, and of the public to receive his services. Thus, this Court has ruled that a lawyer may not be excluded from the bar in a manner which offends due process;[62] nor may the public's right to acquire counsel[63] or to sponsor litigation be suppressed under rules of professional ethics.[64]

The petitioner's disbarment presents a timely occasion for this Court to consider another aspect of the conflict between the efforts of the states to assert complete control over the practice of law, and the constitutional rights of Americans: the permanent disbarment of an attorney under procedures and standards which would vitiate a ten day jail sentence under the same circumstances. Petitioner

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[62] *Schware v. Board of Bar Examiners*, 353 U. S. 232 (1957); *Konigsberg v. State Bar of California*, 353 U. S. 257 (1957).

[63] *Brotherhood of Railroad Trainmen v. Virginia*, 377 U. S. 1 (1964).

[64] *National Association for the Advancement of Colored People v. Button*, 371 U. S. 415 (1963).

was tried by a biased board that could never be permitted to sit as his jury in a proper trial; he was judged by an inadequate standard of proof and convicted on no proof of moral delinquency; he was denied knowledge of the identity of his accusers and punished with a sentence of such harshness as to bear no relation to the extent of any proven misconduct.

Grant of certiorari in this case will permit the Court to consider important and sweeping constitutional questions raised by the administration of modern disciplinary procedures in the state bars, and to correct a serious injustice to the petitioner.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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*Counsel for Petitioner.*

# APPENDIX A.

## OPINIONS AND ORDERS BELOW.

### Opinion of the Supreme Court of Ohio, Case D. D. No. 72.

ON CERTIFIED REPORT by the Board of Commissioners on Grievances and Discipline.

The relator, the Ohio State Bar Association, filed a complaint against the respondent, Wilmer D. Rekeweg, charging him with misconduct as an attorney at law while acting as fiduciary in cases involving estates of decedents.

The Board of Commissioners on Grievances and Discipline found that the evidence displayed a course of conduct by respondent of transferring funds from estate or trust accounts and commingling them with his personal account. His excuse was that the funds so transferred were fees. The board found that in some cases there was a complete disparity between the amounts transferred and the total value of the estates to the point that the board could not believe that respondent could conscientiously feel that these amounts could ever be justified as fees.

The board found further that respondent knowingly commingled substantial trust funds with his personal funds in violation of Canon 11 of the Canons of Professional Ethics and Section 5(a) of Rule XVIII of the Supreme Court of Ohio and, on the basis of such findings, recommended that respondent be permanently disbarred from the practice of law.

The matter is now before this Court for consideration of the report of the board and the objections of respondent.

*Mr. Thomas R. Spellerberg, Mr. William F. Hecker, Mr. Robert J. Kuhn* and *Mr. John R. Welch*, for relators.

*Mr. Arthur S. Newcomer, Mr. John B. Dwyer* and *Mr. John J. Chester*, for respondent.

*Per Curiam.* The findings of the board are supported by the evidence and its recommendation is warranted. Therefore, the report of the board is confirmed, and judgment is rendered permanently disbarring respondent from the practice of law.

*Report confirmed and judgment accordingly.*

TAFT, C.J., ZIMMERMAN, MATTHIAS, O'NEILL and BROWN, JJ., concur.

HERBERT and SCHNEIDER, JJ., are of the opinion that an indefinite suspension would be sufficient.

**Findings and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio (Case No. 96).**

This matter came on for the consideration of the Board of Commissioners on Grievances and Discipline on the report of the Hearing Panel, the transcript of the proceedings before the Panel and the exhibits. Upon consideration thereof the Board makes the following findings and recommendation.

The Respondent is fifty-three years old and was admitted to the Bar of Ohio in 1937. He has practiced for twenty-seven or twenty-eight years in Paulding, Ohio, except for a period of three and one-half years when he was in the service.

FIRST COUNT.

The evidence on the first specification of misconduct shows a commingling of funds of the Bertha Majors estate with Respondent's personal funds. Respondent was appointed as Administrator with Will Annexed of this estate in the Paulding County Probate Court on May 5, 1961. He admitted the transfer of $200 from the estate on November 3, 1961; $565 and $1,685, totaling $2,250, on February

8, 1962; and $2,950 on June 2, 1962, totaling $5,400. He claimed these were intended as fees when questioned about them but admitted to Board Member Fred Smith that the $2,950 item was one that he had written out in error, forgetting that he no longer had any more fees coming. Respondent claimed that when the $2,250 was taken on February 8, 1962, $565 of this amount was for fees that were actually allowed by the court and the other $1,685 is some additional that he considered he had coming in connection with the recovery of some real estate for the estate; however, this additional $1,685 was never allowed by the court.

On cross-examination he admitted that he also withdrew $490 from the account on July 27, 1961, $490 on March 25, 1961, and two withdrawals of $175 and $100,—all of which he said were for fees. No application for extra compensation was made by him, and none was ever allowed. All of the above transfers, which Respondent claimed were for fees, totaled $6,655. The evidence showed that the estate itself amounted only to $8,012.61.

At a hearing before Judge William L. Day, Probate Judge of Paulding County, on August 12, 1963, to remove Respondent as Administrator in said estate, Respondent had admitted, during a recess of those proceedings, that he had misused funds of the estate. This was testified to by Attorney Harvey E. Hyman, who had represented dissatisfied heirs of Bertha Majors in said proceedings to remove Respondent as Administrator (R. 325).

Judge William L. Day, said Probate Judge, also testified before the Hearing Panel of the Board. Judge Day testified that Respondent had admitted misuse of the estate funds (R. 115). Testimony was produced to show that Judge Day had given Respondent time to dispose of some stock to procure funds with which to pay back to the estate

a sufficient amount to balance the accounting. The Respondent's testimony before the Hearing Panel was different than the testimony which he had given in the hearing before Judge Day and, during the hearing before this Panel, the respondent admitted that he had given different answers under oath in the Removal Proceedings on August 12, 1963, but claimed that the testimony which he was giving before this Hearing Panel was correct (R. 202).

SECOND COUNT.

Evidence on the second count showed that first and final account filed by Respondent on August 20, 1963, reflected assets in the estate of $8,012.61, and disbursements of $8,012.61, while the records of the bank, where Respondent maintained this fiduciary account, reflected deposits of $14,947.25 and withdrawals of $14,947.25.

The evidence showed that on August 9, 1963, Respondent transferred from his personal funds to the Administrator's account the sum of $2,854.07 and did, on August 20, 1963, transfer to said account from his personal funds the further sum of $1,219.56, in order to bring said account into closer balance.

Although the evidence clearly established that Respondent, as fiduciary, handled in his fiduciary account more income and had more expenditures than were reflected on the final account filed in the estate, the Board finds that some of this difference was explained by the fact that Respondent had issued to himself checks without authority (as established under count one) and then had issued personal checks back to the fiduciary account to return to the fiduciary account money which had been transferred improperly by Respondent to himself,—all of which resulted in increased activity in the account. The Board is not satisfied that the entire disparity was due to

these operations, but, inasmuch as this account was approved by the Probate Court and has not been reopened or set aside by the Probate Court, the Board finds that the evidence with respect to count number two does not establish a violation of Canon 11 of the Canons of Professional Ethics adopted by this court over and beyond the findings made by the Board under count number one.

THIRD COUNT.

The evidence supports the third specification of misconduct of commingling funds of the Carl Charlie Williams estate with Respondent's personal funds. He was appointed Administrator of this estate in Henry County on April 29, 1963. He admitted that $4,750 was transferred on July 11, 1963, from the fiduciary's account to his personal account. Again the claim was made that this was for a fee. However, the evidence shows that the only assets in this estate were a wrongful death claim which was settled for $32,500, a personal injury claim which was settled for $2,500, and $375 worth of furniture. The evidence shows that when the $35,000 check was received in settlement, that very same day Respondent issued a check to himself for $8,750, which would represent one-fourth of the amount recovered. Ultimately the Probate Court of Henry County did not allow quite this much for that recovery. The only assets in the estate which would have been subject to the administration fee and attorney's fee would have been the net amount of $1,875.00 remaining after paying twenty-five per cent (25%) of the $2,500, and $375 worth of furniture. This would have provided for a minimum fee, which the Court ultimately allowed, of $62.50 for the administrator and $125 for the attorney.

Under the circumstances it is impossible to believe that Respondent could have seriously believed that he was

entitled to $4,750 fee for the administration of this estate. The collateral evidence shows that he deposited this $4,750 check in his personal account on July 11, 1963, and that it, together with other items, made a total deposit on that date in his personal account of $6,624.01.

Exhibit 9-92, which was one of the ledger cards of Respondent's personal account, showed that if he had not had the $4,750 item in the deposit of $6,624.01 at the time he made the deposit on July 11, 1963, his account would have been overdrawn $1,298.60.

Respondent tried to justify this so-called attorney fee by suggesting that he would be entitled to twenty per cent (20%) of the amount administered in the estate. Mr. Hyman, however, testified that the fee in Paulding County was based on 6% of the first $1,000; 4% on the next $4,000 and 2% on the balance.

It was testified to by Respondent and by Attorney Hyman that ordinary fees were chargeable under the county practice without an order of court, but that extraordinary compensation had to be requested and approved by the court. No request was ever made for the approval of the transfers in either the Williams or the Majors estate, even though these were admittedly more than ordinary fees. In fact, when an application was finally made sometime later, the court allowed substantially less by way of fees.

FOURTH COUNT.

The evidence on the fourth specification of misconduct shows that on August 9, 1963, Respondent transferred $2,500 from his fiduciary account in his name as Administrator of the estate of Carl Williams, to the widow of Carl Williams as her distribution from the estate; that on the same day, August 9, 1963, the widow endorsed said check

back to Respondent for the purpose of paying certain personal expenses of the decedent; that Respondent deposited said check in his personal account; that part of this money remained in Respondent's personal account for a number of months; and Respondent did thereby commingle said trust funds with his personal fund in violation of Canon 11 of the Canons of Professional Ethics as adopted by this court.

FIFTH COUNT.

The evidence supports the fifth specification of misconduct of commingling funds of the Boyd G. Engleman estate with Respondent's personal funds. He was appointed Administrator of this estate in Paulding County on January 29, 1955. Respondent admittedly transferred $1,803 on May 27, 1955, consisting of the following four items—$760, $350, $243 and $450—from his fiduciary account to his personal account, although three of these items—$760, $350 and $243—had previously been received by Respondent pursuant to an order of court (Resp. Ex. 2-B) in the Engleman real estate proceedings, Case No. 670. The Respondent's excuse was that he forgot he had paid himself once and erroneously paid himself the second time (R. 320).

SIXTH COUNT.

The evidence on the sixth specification of misconduct shows that, according to the final account, Respondent received $10,616.76 and disbursed a like amount, whereas the Engleman estate ledger sheet in the bank showed deposits of $22,179.93 and like withdrawals. The evidence showed that part of the disparity was occasioned by the repayment from Respondent to the fiduciary account of the amount transferred by Respondent from his fudiciary

account to his personal account, without authority of court, as detailed under the fifth count. Specifically, he repaid $1,485.03 to the fiduciary account on July 29, 1963. It was claimed by the Respondent that some of the funds which went through the estate bank account should not have been included in the account because they concerned a half-interest of real estate which belonged to the decedent's sister (R. 302). However, there was never any satisfactory explanation by Respondent with respect to $3,000 of the funds from the sale of real estate, which had been deposited by Respondent in his personal account and which the records did not show had ever been transferred by Respondent to the fiduciary account. As an excuse for this discrepancy, Respondent said, "I would have to say was written as fees. That's all there is to it." (R. 311.) The evidence on this count does show a commingling of funds.

SEVENTH COUNT.

The evidence supports the seventh specification of misconduct of commingling funds of the John D. Prior estate with Respondent's personal funds. He was appointed Executor of this estate in Paulding County on November 4, 1957. Respondent admits he transferred without authority from his fiduciary account to his personal account $1,000 on February 15, 1958, $1,000 on May 24, 1958, $2,500 on November 3, 1958, and $3,000 on January 4, 1960 for a total of $7,500, claiming these as fees, although Respondent failed to account for these withdrawals in his first and final account filed on February 6, 1963, five years and four months after his appointment. He did take credit for $5,000 in his accounting but subsequently by court order was permitted to keep only $4,500 and was ordered to refund $3,000 to the estate, with interest (R. 343).

EIGHTH COUNT.

The evidence on the eighth specification of misconduct shows that the first and final account was filed by Respondent on February 6, 1963, more than five years after his appointment; that this account charged Respondent with receiving $27,746.87 and disbursements of a like amount; that the records at the bank with respect to said fiduciary account showed that Respondent had deposited in said account the sum of $37,528.66 and had disbursed the same amount.

The Board finds that a part of the variance between the figures shown on the final account and the bank records was occasioned by transfers from Respondent to himself individually of funds which were not authorized and the repayment by Respondent to the fiduciary account of funds which he had previously transferred to his personal account. The Board is not satisfied that there has been a full and complete explanation of the difference between the amount shown on the final account and the amount which was deposited in the fiduciary bank account, but, inasmuch as this account has been approved by the Probate Court of Paulding County and has not been set aside and in view of the fact that the disparity is occasioned, at least in part, by acts of the Respondent which are the subject of the seventh count of the complaint, the Board does not feel that the evidence establishes that there has been a showing of a violation of Canon 11 of the Canons of Professional Ethics with respect to count number eight.

GENERAL FINDINGS.

Testimony in this case displayed a pattern which was followed by Respondent of transferring funds from estate or trust accounts and commingling the same with his personal account. On at least one occasion, the balance

in his personal account was so low that there would have been an overdraft if the transfer had not been made. On another occasion, the balance in one estate's account was such that he would have shown an overdraft if a beneficiary of the estate had not returned to him a distribution which he redeposited to balance the accounts. In all cases, when an issue was raised about these transfers from estate accounts to his personal account, his excuse was that these were fees and he would offer to reimburse the fiduciary accounts.

We were likewise impressed by the fact that this was not a situation where the Respondent kept only one account and failed to keep a trust account. As a matter of fact, in each of these estates the Respondent had specifically set up a separate fiduciary's account and the activity of the Respondent was such that he made unauthorized transfers from these fiduciary accounts to his personal account, and it was at this point that the commingling of funds took place.

The Board was also impressed by the testimony of Judge William L. Day, Probate Judge of Paulding County, and Attorney Harvey E. Hyman, both of whom testified to the admissions that had been made by Respondent in probate proceedings in the Majors case.

In several of the cases, there was a complete disparity between the amounts transferred by Respondent and the total value of the estates, to the point that the Board could not believe that Respondent could conscientiously feel that these amounts could ever be justified as fees. Likewise, Respondent admitted that fees which were larger than "normal fees" were payable in Paulding County only upon application made to the Probate Court and approval thereof. In none of these cases did the Respondent make such an application. As a matter of fact, when the issue was

finally resolved by the Probate Court, the fees allowed were substantially less than the amounts that had been taken by the Respondent, and Respondent was ordered to repay the excess amounts back to the estate.

FINDINGS.

We find that with respect to counts one, three, four, five, six and seven, the Respondent knowingly commingled substantial trust funds with his personal funds in violation of Canon 11 of the Canons of Professional Ethics and Section 5(a) of Rule XVIII of the Supreme Court of Ohio and did further commit the crime of embezzlement as defined in Section 2907.34 of the Revised Code, being a crime involving moral turpitude.

With respect to counts two and eight, the Board finds that the evidence fails to establish the commingling of trust funds in excess of those which were proven under counts one and seven, respectively.

RECOMMENDATION.

On the basis of the foregoing findings it is the recommendation of the Board that Respondent, Wilmer D. Rekeweg, be permanently disbarred from the practice of law pursuant to Section 6(a) of Rule XVIII of the Supreme Court of Ohio.

CARL F. ALLEBAUGH,
*Chairman, Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio,*

WILLIAM D. RADCLIFF,
*Secretary, Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio.*

# APPENDIX B.

## STATUTES AND RULES.

### OHIO REVISED CODE.

**§ 2907.34 Embezzlement or fraudulent conversion:**

No officer, attorney at law, agent, clerk, guardian, executor, executrix, administrator, administratrix, trustee, assignee in insolvency, receiver, officer of a lodge or subordinate body of a fraternal or mutual benefit society, servant, or employee of a person, except apprentices or persons under eighteen years of age, shall embezzle or convert to his own use, fraudulently take or make away with, or secrete with intent to embezzle or convert to his own use anything of value which comes into his possession by virtue of his election, appointment, or employment thereto.

Whoever violates this section shall be imprisoned not less than one nor more than ten years if the total value of the property embezzled in the same continuous employment or term of office, whether embezzled at one time or at different times within three years prior to the inception of the prosecution, is sixty dollars or more. If such total value is less than sixty dollars, such person shall be fined not more than three hundred dollars or imprisoned not more than ninety days, or both.

**§ 2945.04 Reasonable doubt.**

A defendant in a criminal action is presumed to be innocent until he is proved guilty of the crime charged, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he shall be acquitted. This presumption of innocence places upon the state the burden of proving him guilty beyond reasonable doubt.

Reasonable doubt is defined as follows: "It is not a mere possible doubt, because everything relating to human affairs or depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of

all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge."

In charging a jury the trial court shall state the meaning of presumption of innocence, and read said definition of reasonable doubt.

## RULES OF PRACTICE OF THE SUPREME COURT OF OHIO.

### RULE XVIII.

### DISCIPLINARY PROCEDURE.

Pursuant to the powers of this Court over the Bar of this State and the members thereof, this rule is amended, as follows, effective on March 11, 1964, and shall apply to all pending cases.

**(1) Creation of Board of Commissioners on Grievances and Discipline.** There is hereby created as Commissioners of this Court a Board of Commissioners on Grievances and Discipline. Said Board of Commissioners shall consist of seventeen (17) members of the Bar of this Court, appointed by this Court. One member of such Board shall be appointed from each of the following districts: *District 1,* comprising Butler, Clermont, Clinton, Hamilton and Warren Counties. *District 2,* comprising Darke, Miami, Montgomery, Preble and Shelby Counties. *District 3,* comprising Defiance, Fulton, Hancock, Henry, Paulding, Putnam, Van Wert, Williams and Wood Counties. *District 4,* comprising Lucas County. *District 5,* comprising Crawford, Delaware, Marion, Morrow, Ottawa, Sandusky, Seneca and Wyandot Counties. *District 6,* comprising Champaign, Clark, Fayette, Greene, Logan, Madison and Union Counties. *District 7,* comprising Franklin County. *District 8,* comprising Adams, Brown, Gallia, Highland, Jackson, Lawrence, Pickaway, Pike, Ross, Scioto and Vinton Counties. *District 9,* comprising Coshocton, Fairfield, Knox, Licking, Muskingum and Perry Counties. *District 10,* comprising Ashland, Erie, Holmes, Huron, Lorain,

Medina, Richland and Wayne Counties. *District 11,* comprising Portage and Summit Counties. *District 12,* comprising Cuyahoga County. *District 13,* comprising Ashtabula, Columbiana, Geauga, Lake, Mahoning and Trumbull Counties. *District 14,* comprising Carroll, Stark and Tuscarawas Counties. *District 15,* comprising Belmont, Guernsey, Harrison, Jefferson and Monroe Counties. *District 16,* comprising Allen, Auglaize, Hardin and Mercer Counties. *District 17,* comprising Athens, Hocking, Meigs, Morgan, Noble and Washington Counties. The term of office of each member of said Board of Commissioners shall be three (3) years, beginning on January 1 next following his appointment. Provided, however, that any member of the Board whose term has expired and who shall have an uncompleted assignment as a member of a panel shall continue to serve for the purpose of such assignment until it shall have been concluded before the Board of Commissioners, and further provided that his successor commissioner shall take no part in the proceedings of the Board concerning such assignment. Appointments to terms commencing January 1 of any year shall be made prior to December 1 of the preceding year. Vacancies for any cause shall be forthwith filled by appointment by this Court for the unexpired term. The Court shall each year designate one member as Chairman of said Board of Commissioners, and designate a Secretary, each of whom shall have authority to execute journal entries on behalf of the Board of Commissioners and of panels thereof.

(2) **Jurisdiction of Board.** The Board of Commissioners is empowered and charged to receive, entertain, inquire into, take evidence, make findings and submit recommendations to this Court, as hereinafter provided,

(a) concerning complaints of misconduct as hereinafter defined which are alleged to have been committed by an attorney and counselor at law, person under suspension for an indefinite period from the practice of law, or judge, of

(b) concerning the mental illness of any attorney and counselor at law or judge, or

(c) relating to petitions for reinstatement as an attorney and counselor at law in this State, or

(d) upon reference by this Court of conduct affecting any proceeding under this rule, where the acts allegedly constitute a contempt of this Court but did not take place in the actual presence thereof, whether by willful disobedience of any order or judgment of this Court or the Board of Commissioners, by interference with any officer of this Court in the prosecution of any duty, or otherwise.

**(3) Referral for Investigation.** The Board of Commissioners may refer to the Grievance Committee of the appropriate local bar association or to the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association any matters coming to its attention for investigation, as hereinafter provided.

**(4) Application of Rule; Authority and Duty of Local Committees.** From and after the effective date of this rule, all proceedings with regard to mental illness and complaints and grievances involving alleged misconduct by attorneys and counselors at law and judges; all proceedings for the discipline of such attorneys and counselors at law, persons under suspension for an indefinite period or disbarred from the practice of law, and judges; and all proceedings for reinstatement as an attorney and counselor at law shall be brought, conducted and disposed of in accordance with the provisions of this rule. Any committee authorized by any regularly organized bar association or by the Ohio State Bar Association shall investigate any matter referred to it or which comes to its attention, and may cause a complaint to be filed pursuant to this rule in cases where misconduct, contempt, or mental illness is found; provided, however, that nothing herein shall affect disciplinary procedures of any regularly organized bar association under the provisions of its constitution not inconsistent with this rule.

The Board of Commissioners or any member thereof, the Chairman of the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association, and the President, Secretary or Chairman of the Grievance Committee of any regularly organized local bar association in the State may call upon any attorney and counselor at law or judge in the State to assist in any investigation or to testify in any hearing before the Board of Commissioners or any panel for which provision is made in this rule, as to any matter as to which he would not be bound to claim privilege as an attorney at law. No such attorney and counselor at law or judge shall neglect or refuse so to assist in any such investigation or so to testify.

(5) **Definitions.**

(a) **Misconduct.** Misconduct shall mean any violation of any provision of the oath of office taken upon admission to practice of law in this State, or any violation of the Canons of Professional Ethics or the Canons of Judicial Ethics as adopted by the Court from time to time, disobedience of the terms of an order imposing a suspension for an indefinite period from the practice of law, or the commission or conviction of a crime involving moral turpitude.

(b) **Mental Illness.** Mental illness shall mean the condition defined in Section 5122.01 (A), Revised Code.

(6) **Manner of Discipline.** Each attorney and counselor at law or judge found guilty of misconduct shall be disciplined. The discipline of such persons shall be

(a) a permanent disbarment from the practice of law, or

(b) suspension for an indefinite period from the practice of law subject only to reinstatement as hereinafter provided, or

(c) a public reprimand, or

(d) a private reprimand.

(7) **Effect of Discipline.** A person disbarred shall never thereafter be readmitted to the practice of law in

this State. A person who shall have voluntarily surrendered his license to practice and thereafter has been reinstated in the manner hereinafter provided and a person who has been suspended for an indefinite period from the practice of law and thereafter reinstated in the manner hereinafter provided shall be disbarred upon being found guilty of subsequent misconduct. A person who has been publicly reprimanded for misconduct, upon being found guilty of subsequent misconduct, shall be suspended for an indefinite period from the practice of law or permanently disbarred, depending upon the seriousness of such misconduct.

**(8) The Complaint; Where Filed; By Whom Signed.** A complaint shall mean a formal written complaint alleging misconduct or mental illness of one who shall be designated as the Respondent. Six (6) copies of all such complaints shall be filed in the office of the Secretary of the Board. Such complaint shall not be accepted for filing unless it is signed by one or more members of the Bar of Ohio in good standing (who shall be counsel for the Relator) and supported by a certificate in writing signed either by the Chairman of the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association or by the President, Secretary or Chairman of the Grievance Committee of any regularly organized local bar association in the State (which association shall be deemed the Relator), certifying that said counsel are duly authorized to represent said Relator in the premises and have accepted the responsibility of prosecuting the complaint to conclusion. Such certification shall constitute a representation that, after investigation, the Relator believes reasonable cause exists to warrant a hearing on such complaint, and shall constitute the authorization of such counsel to represent said Relator in the premises as fully and completely as if designated and appointed by order of the Supreme Court of Ohio with all the privileges and immunities of an officer of such Court. The complaint may also, but need not, be signed by the person aggrieved.

**(9) Duty of the Board Upon Filing of the Complaint.**

**(a) Notice to Respondent.** The Secretary of the Board of Commissioners shall send a copy of the complaint by registered mail to the Respondent with a notice requiring him to file, within twenty (20) days after the mailing of such notice, six (6) copies of his answer and to serve copies thereof upon counsel of record named in the complaint.

**(b) Suspension of Right to Practice Pending Disposition of Misconduct Complaint.** After an answer has been filed or the time for answer has elapsed, the Court shall entertain such recommendation as the Board may make for the immediate suspension from the practice of law pending disposition of the complaint if the complaint alleges the conviction of a crime involving moral turpitude supported by a certified copy of the judgment entry of the Court convicting the Respondent.

**(c) Mental Illness Suspension.** After an answer has been filed or the time for answer has elapsed, if the complaint or answer alleges mental illness supported by a certified copy of a journal entry of a court of competent jurisdiction adjudicating mental illness, or if the Board finds existing mental illness after an examination as provided in (d) hereof, the Board shall forthwith certify the complaint to this Court and the Court may suspend the Respondent from the practice of law.

**(d) Examination.** If the complaint or answer alleges existing mental illness unsupported by a journal entry of a court of competent jurisdiction or mental illness is otherwise placed in issue, the Board or panel may, on its own motion or on motion by either party, order a medical or psychiatric examination of Respondent by one or more physicians, designated by the Board or panel, whose findings shall be presented to the Board or panel as evidence and made available to both parties.

**(e) Termination.** Any suspension under this section may be terminated on Respondent's application to the

Board and a showing of removal of the cause for the suspension, which is certified by the Board to, and affirmed by, the Court.

**(10) Hearing by Panel of Three Commissioners.** After Respondent's answer has been filed, or the time has expired within which Respondent was required to file such answer, a formal hearing shall be held, upon reasonable notice, by a panel of Commissioners appointed by the Chairman of said Board of Commissioners, who shall designate one member of such panel as chairman of the panel. Such panel shall consist of three (3) Commissioners, no one of whom shall be a resident of the district from which such complaint originated. A majority of such panel shall constitute a quorum for all purposes.

The Chairman of the panel may have a transcript prepared of the testimony taken at each such formal hearing, and the cost thereof shall be paid by the Secretary of the Board of Commissioners, or taxed as costs.

**(11) Dismissal of Complaint.** If the panel finds that the complaint or evidence is insufficient, the panel shall make its certified report of the proceedings and recommendations to the Board of Commissioners which shall review the proceedings, and shall dismiss the complaint, or refer the matter back to the panel for further hearing or the administering of a private reprimand, or may proceed upon the certified report of the proceedings before the panel. The Secretary of the Board of Commissioners shall give notice of a dismissal to the Respondent, all counsel of record, the Ohio State Bar Association, and the local bar association or associations of the county or counties in which the Respondent resides and maintains his office, and of the county or counties from which the complaint arose.

If a written request for a conference with the Supreme Court of Ohio is made by the Relator within twenty (20) days after the issuance of such notice, Relator, Respondent and a member of the hearing panel will be called to confer with the Court.

**(12) Private Reprimand; Duty of Panel.** If the panel finds and determines that the Respondent is guilty of misconduct and that private reprimand should be administered, such panel shall administer such reprimand and such action shall be reported to the Secretary of the Board of Commissioners, who shall notify the same persons and organizations that would have received notice if the complaint had been dismissed by such panel.

If a written request for a conference with the Supreme Court of Ohio is made by the Relator within twenty (20) days after the issuance of such notice, Relator, Respondent and a member of the hearing panel will be called to confer with the Court.

**(13) Public Reprimand; Suspension or Permanent Disbarment; Duty of Panel.** If the panel finds and determines that the Respondent is guilty of misconduct and that public reprimand, suspension for an indefinite period, or permanent disbarment is merited, the panel shall make its certified report of the proceedings before it, including its findings of fact and recommendations, and shall file the same, together with the transcript of testimony taken and an itemized statement of the actual and necessary expenses incurred in connection with such proceedings, with the Secretary of the Board of Commissioners.

**(14) Review by Entire Board of Commissioners; Board to Administer Private Reprimand.** Upon review, said Board of Commissioners may refer the matter back to the panel for further hearing or may order a further hearing to be presented before said Board of Commissioners or may proceed upon the certified report of the prior proceedings before the panel. Upon the final review, the Board of Commissioners may dismiss the complaint or find that the Respondent is guilty of misconduct. If the Board of Commissioners determines that a private reprimand shall be administered it shall administer such private reprimand. If the complaint is dismissed, or a private reprimand is administered, such action shall be reported to the Secretary of the Board of Commissioners, who shall

notify the same persons and organizations that would have received notice if the complaint had been dismissed by the panel that heard the matter.

**(15) Public Reprimand; Suspension or Permanent Disbarment; Duty of Board After Review.** If the Board of Commissioners determines that a public reprimand, suspension for an indefinite period from the practice of law or permanent disbarment is merited, said Board of Commissioners shall thereupon make a final certified report of such proceedings, including its findings of fact and recommendations, and shall file the same, together with the transcript of testimony taken and an itemized statement of the actual and necessary expenses incurred in connection with such proceedings, in the office of the Clerk of this Court, and shall forthwith notify the Respondent and all counsel of record of such action, enclosing with such notice a copy of the findings of fact and recommendations and a copy of the statement of the actual and necessary expenses incurred.

**(16) Show Cause Order Issued by the Court to Respondent.** On the filing of such final report of the Board of Commissioners, this Court shall issue to the Respondent an order to show cause why the report of said Board of Commissioners shall not be confirmed and a disciplinary order entered. Notice of the order to show cause shall be served by the Clerk of this Court on the Respondent and all counsel of record, personally or by registered mail.

**(17) Response to Order to Show Cause and Objections.** The Respondent or Relator within twenty (20) days after the issuance of an order to show cause may file objections to the findings or recommendations of the Board of Commissioners and to the entry of a disciplinary order or to the confirmation of the report on which the order to show cause was issued, and a brief in support of such objections, together with proof of service of copies thereof on the Secretary of the Board of Commissioners and on all counsel of record. All objections and briefs shall be

filed in the number and form required by rules of this Court for original actions.

**(18) Answer Briefs.** Answer briefs together with proof of service shall be filed within fifteen (15) days after briefs in support of objections have been filed. All briefs shall be filed in the number and form required by rules of this Court for original actions.

**(19) Review by Court; Reimbursement for Expenses of Board; Duty of Clerk on Entering Order.** After hearing on objections, or, if objections are not filed within the prescribed time, this Court shall enter such order as it may find proper, which may include provision for reimbursement of costs and expenses incurred by the Board of Commissioners. Upon the entry of any disciplinary order pursuant to this rule, the Clerk of the Court shall mail certified copies thereof to counsel of record, to the Board of Commissioners, to Respondent (at his last known address), to the Ohio State Bar Association, to the local bar association or associations in the county or counties in which the Respondent resides and maintains his office and the county or counties from which the complaint originated, to the Presiding Judge of the Court of Common Pleas for such county or counties, and to the Presiding Judge of the United States District Courts in Ohio; the United States Court of Appeals for the Sixth Circuit; and to the Supreme Court of the United States.

If a disciplinary order of the Court provides for a public reprimand, the Clerk of this Court shall arrange for publication thereof in the Ohio Bar publication of the Ohio State Bar Association and in a publication, if any, of the Relator local bar association.

If a disciplinary order of the Court provides for a permanent disbarment or suspension for an indefinite period from the practice of law, the Clerk of this Court shall arrange for publication thereof in the official reports of this Court, in the Ohio Bar publication of the Ohio State Bar Association and in a publication, if any, of the Relator local bar association.

**(20) Proceedings Private; Exceptions.** All proceedings and documents relating to complaints and hearings thereon and proceedings in connection therewith shall be private except

(a) Where the Respondent shall request in writing that they be public, or

(b) Where proceedings filed with the Supreme Court of Ohio recommend the discipline of permanent disbarment or suspension for an indefinite period, or

(c) Where any disciplinary matter is heard by the Supreme Court of Ohio, other than in conference, on objections to the findings or recommendations of the Board of Commissioners.

(A copy of the findings, recommendations and actions of the Panel and the Board of Commissioners in each case shall be given to any member of the Court upon request.)

**(21) Petition for Reinstatement.** No petition for reinstatement to the practice of law shall be entertained by this Court and the same may not be filed in this Court, within a period of two (2) years after the entry of an order suspending for an indefinite period the Petitioner from the practice of law in this State, or within a period of two (2) years after the denial of a petition for reinstatement to the practice of law filed by such Petitioner.

**(22) Contents of Petition for Reinstatement.** Subject to the foregoing restrictions, any person who has been suspended for an indefinite period from the practice of law and who wishes to be reinstated may file his verified petition and twenty (20) copies thereof with the Clerk of this Court, setting forth

(a) the date when such suspension was ordered, and if there was a reported opinion, the volume and page of the official reports of this Court where such opinion appears;

(b) the dates all such prior petitions for reinstatement were filed, denied or granted;

(c) the names of all persons and organizations, except the Petitioner and the Board of Commissioners, who

were, or would be, entitled, under this Rule, to receive from the Clerk of this Court certified copies of the disciplinary order of this Court against Petitioner resulting in his suspension; and the name of the local bar association or associations in the County in which he resides at the time of the filing of the petition and of each County in which he proposes to maintain an office if reinstated; and

(d) the facts upon which he relies to establish by clear and convincing evidence that he possesses all the qualifications, mental, educational and moral, which would have been a requirement of an applicant for admission to the Bar of Ohio at the time of his original admission, and that he is now a proper person to be readmitted to the Bar of Ohio, notwithstanding the previous disciplinary action taken against him.

**(23) Costs to be Deposited with Petition for Reinstatement.** Such petition shall be accompanied by a deposit in an amount to be fixed by the Clerk, for probable costs and expenses to be incurred in connection with said proceedings, which shall include any amounts unpaid under any prior order of this Court.

**(24) Requisites for Reinstatement.** No person shall be reinstated unless he has established by clear and convincing evidence that he possess all of the qualifications, mental, educational and moral, which would have been a requirement of an applicant for admission to the Bar of Ohio at the time of his original admission, and that he is now a proper person to be readmitted to the Bar of Ohio, notwithstanding the previous disciplinary action taken against the Petitioner. In such case the order of reinstatement may be conditioned upon the Petitioner's subsequently taking and passing a regular bar examination of this Court and thereafter taking the prescribed oath of office.

Paragraphs C and D of Section 6 of Rule XVII shall not apply to any petitioner with respect to whom such an order of reinstatement may have been issued.

**(25) Petition for Reinstatement Referred to Board of Commissioners.** Unless denied forthwith for insufficiency in form or substance, the Clerk shall forward five (5) copies of the petition to the Secretary of the Board of Commissioners and such petition shall be deemed to be referred, without court order, to the Board of Commissioners to hold a hearing or hearings, and take and report evidence relevant to the rehabilitation of the Petitioner and his possession of all the qualifications, mental, educational and moral, required of an applicant for admission to the Bar of Ohio at the time of his original admission.

**(26) Hearing of Petition by Panel of Three; Hearing Shall Be Public; Who May Appear; Appeal to Court From Denial of Petition by Board of Commissioners.** The Chairman of the Board of Commissioners shall appoint a hearing panel of three (3) Commissioners no one of whom shall be a resident of the district in which the Petitioner resides or of the district in which he resided at the time of his suspension and said panel shall conduct a hearing or hearings upon such petition. Reasonable notice of any hearing shall be given to the Petitioner or his counsel and to all persons or organizations referred to in Section (22) (c). Such hearing shall be public. Any interested person, any member of the Bar, and any representative of any local bar association or of the Ohio State Bar Association may appear before the hearing panel in support of or in opposition to the petition.

The hearing panel shall make and certify a report of the proceedings before it, including its findings of fact and recommendations, to the Board of Commissioners; and all proceedings before such panel and the Board of Commissioners shall, whenever appropriate, be governed by the provisions hereinbefore contained governing disciplinary proceedings, including proceedings in this Court or an issuance of an order to show cause why the final report of the Board of Commissioners should not be confirmed.

The Board, in its discretion, may recommend that the Petitioner be required to take and pass one of the regular bar examinations as a condition to readmission. If the

final report should recommend denial of the petition, the Petitioner shall have ten (10) days from receipt of notice of the date of filing such report to file objections thereto and brief in support thereof.

If the final report should recommend granting of the petition any person or organization referred to in Section (22) (c) shall have ten (10) days from the receipt of notice of filing of such report to file objections to the recommendations and brief in support thereof. The Court shall thereupon enter an appropriate order, which may include such provisions for reimbursement of the costs and expenses incurred in connection with the proceedings as the Court shall deem just.

**(27) Manner of Service of Notices, etc.** Whenever provision is made for the service of any notice, order, report or other paper or copy thereof upon any Respondent or Petitioner in connection with any proceeding involving a complaint or a petition for reinstatement, service may be made upon counsel of record for such Respondent or Petitioner, either personally or by registered mail.

**(28) Quorum of Panel or Board.** A majority of the members of the Board of Commissioners or of a hearing panel shall constitute a quorum for all purposes and the action of a majority of those present comprising such quorum shall be the action of the Board of Commissioners or of such hearing panel.

**(29) Clerk is Agent for Service of Notices on Nonresident Attorney.** Any nonresident of this State, having been admitted as an attorney and counselor at law by the rules of this Court, or any resident of this State, having been admitted as an attorney and counselor at law by the rules of this Court, who subsequently becomes a nonresident or conceals his whereabouts, by such admission to the practice of law within this State makes the Clerk of this Court his agent for the service of any notice provided for in any proceeding instituted before the Board of Commissioners against such attorney and counselor at law or judge, pursuant to this Rule.

**(30) Manner of Service on Clerk; Record of Such Service Not a Public Record.** All such notices shall be served by the Secretary of the Board of Commissioners upon the Clerk of this Court by leaving at the office of said Clerk a true and attested copy of such notice and any accompanying document and by sending to the Respondent, by registered mail, postage prepaid, return receipt requested, a like, true and attested copy, with an endorsement thereon of the service upon said Clerk of this Court, addressed to such Respondent at his last known address. The postmaster's receipt for the payment of such registered postage shall be attached to and made a part of the return of service of such notice by the Secretary. The panel or Board of Commissioners or Court before which there is pending any proceeding in which notice has been given as provided in this section may order such continuance as is necessary to afford the Respondent reasonable opportunity to appear and defend. The Clerk of this Court shall keep a record of the day and hour of the service upon him of such notice and any accompanying document, which shall not be a public record in the office of said Clerk.

**(31) Power to Issue Subpoenas.** In investigations and proceedings under this rule, upon application by the Chairman, Vice Chairman, Secretary, or Counsel of the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association, or by the President, Secretary or Chairman of the Grievance Committee of any regularly organized local bar association in the state authorized to sign a certificate under Section (8) hereof, or by the Respondent or Relator, each member of the Board of Commissioners and its Secretary shall have power to issue subpoenas and to cause testimony to be taken under oath before the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association, or any sub-committee thereof, or before the Grievance Committee of any regularly organized local bar association in the State, or before a hearing panel of the Board of Commissioners. All such subpoenas shall be issued in the name

and under the seal of this Court and shall be signed by a member of the Board of Commissioners or its Secretary and served as provided by statute.

**(32) May Order Depositions.** The Secretary of the Board of Commissioners may order testimony of a witness to be taken by deposition within or without this State in the manner prescribed for the taking of depositions in civil actions, and such depositions may be used to the same extent as permitted in civil actions.

**(33) Effect of Refusal to Testify.** The refusal or neglect of the person subpoenaed as a witness to obey a subpoena, to attend, to be sworn or to affirm, or to answer any proper question shall be deemed to be contempt of this Court and shall be punishable accordingly.

**(34) Rules of Evidence.** All rules of evidence shall be observed in the conduct of all hearings, and the Respondent may be represented by counsel, who shall enter formal appearance.

**(35) Docket of Complaints.** The Secretary of the Board of Commissioners shall keep a docket of each complaint and of all proceedings thereon, which shall be retained permanently as a part of the records of his office.

**(36) Board May Prescribe Rules.** The Board of Commissioners may, subject to the prior approval of this Court, adopt other rules and regulations not inconsistent herewith.

**(37) Rule to be Liberally Construed.** The process and procedure under this Rule and other regulations approved by this Court shall be as summary as reasonably may be. Amendments to any complaint, notice, answer, objections, report or order to show cause may be made at any time prior to final order of the Court. The party ffected by such amendment shall be given reasonable opportunity to meet any new matter presented thereby. No investigation or procedure shall be held to be invalid by reason of any nonprejudicial irregularity or for any error not resulting in a miscarriage of justice. This Rule

and such regulations relating to investigations and proceedings involving complaints of misconduct and petitions for reinstatement shall be liberally construed for the protection of the public, the Courts and the legal profession and shall apply to all pending investigations and complaints so far as may be practicable, and to all future investigations, complaints and petitions whether the conduct involved occurred prior or subsequent to the amendment of this Rule. To the extent that application of this amended Rule to such pending proceedings may not be practicable, the rules and regulations in force at the time this amended Rule became effective shall continue to apply.

## RULE XIX.

## RULES OF PROFESSIONAL CONDUCT.

**Section 1.** These rules of professional conduct shall be binding upon all members admitted to practice law in the State of Ohio, and the wilful breach thereof shall be punished by reprimand, by suspension or by disbarment, as provided in Rule XVIII of the Rules of Practice.

The Canons of Professional Ethics and the Canons of Judicial Ethics of the American Bar Association as amended are adopted; and nothing in these rules is intended to limit or supersede any provision of law relating to the duties and obligations of attorneys or the consequences of a violation thereof. (The Canons of Professional Ethics were adopted November 13, 1952, and are set forth in 175 Ohio State Reports. The Canons of Judicial Ethics as amended were adopted January 27, 1954, and are set forth in 160 Ohio State Reports.)

**Section 2.** An attorney at law shall not advertise or otherwise solicit professional employment. This rule shall not apply to the publication or use of ordinary professional cards or conventional listings in legal directories and newspapers.

**Section 3.** An attorney at law shall not employ another to solicit or to obtain or remunerate another for soliciting or obtaining professional employment for him.

**Section 4.** An attorney at law shall not acquire an interest adverse to a client in a subject matter concerning which the attorney has been employed.

**Section 5.** An attorney at law shall not, directly or indirectly, without the consent of his client, purchase property at a probate, foreclosure or judicial sale in an action or proceeding in which he appears as attorney for a party.

**Section 6.** An attorney at law shall not represent conflicting interests except with the consent of all parties concerned.

**Section 7.** An attorney at law shall not accept professional employment without first disclosing to his prospective client his relation, if any, with the adverse party, and his interest, if any, in the subject matter of the employment.

**Section 8.** An attorney at law shall not accept employment adverse to a client or former client relating to a matter in reference to which he has obtained confidential information by reason of and in the course of his employment by such client or former client.

# APPENDIX C.

## CONSTITUTION OF THE UNITED STATES.

### AMENDMENT VI.

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

### AMENDMENT VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

### AMENDMENT XIV.

#### SECTION I.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

**No. ~~648~~ 684**

WILMER D. REKEWEG,

Petitioner,

vs.

OHIO STATE BAR ASSOCIATION,

Respondent.

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

## No. 648

WILMER D. REKEWEG,

Petitioner,

vs.

OHIO STATE BAR ASSOCIATION,

Respondent.

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### STATEMENT OF THE CASE AND ARGUMENT

These disciplinary proceedings were commenced by the filing of a complaint by the Ohio State Bar Association with the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio in accordance with Rule XVIII, paragraph 8, of the Rules of the Supreme Court of Ohio (a copy of Rule XVIII is attached hereto as Appendix A).

The complaint against Petitioner charged him with misconduct as an attorney at law while acting as fiduciary and attorney in four cases involving decedent's estates. The complaint contained eight specifications of misconduct which charged Petitioner with commingling funds belonging to these estates with his own personal funds and converting those funds to his own use in violation of Canon 11

of the Canons of Professional Ethics as adopted by the Supreme Court of Ohio and in violation of Section 2907.34, Revised Code of Ohio.

Prior to the filing of the complaint, the Ohio State Bar Association followed its procedure established to comply with paragraph 8 of Rule XVIII. This procedure requires that the Committee on Legal Ethics and Professional Conduct (37 members) make a thorough investigation of the professional conduct of any lawyer whose questionable conduct has come to the attention of that committee. If that committee determines after such investigation that the lawyer thus investigated has been guilty of unethical conduct, it makes its recommendation for the filing of a complaint to the Executive Committee of the Ohio State Bar Association. The Executive Committee (20 members) thoroughly reviews the findings of the Committee on Legal Ethics and Professional Conduct and if it approves the recommendation, a complaint is then filed with the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio in accordance with Rule XVIII.

A lawyer's professional conduct may be brought to the attention of the Ohio State Bar Association's Committee on Legal Ethics and Professional Conduct in several ways: (1) by direct complaint of an alleged injured party, (2) by reference from a fellow lawyer, (3) by such general knowledge in the community as to arouse the interest of the Bar or (4) by referral from the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio in accordance with paragraph 3 of Rule XVIII.

The Petitioner's conduct in this case was brought to the attention of Respondent by Mr. John McMillan, then Secretary of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, with the request that Respondent's Committee on Legal Ethics and Profes-

sional Conduct investigate Petitioner's conduct and practice in handling the estates involved in this case, and others.

Subsequent to the request for an investigation by Mr. McMillan, Respondent was informed of Petitioner's removal as Executor of the Estate of John D. Prior, deceased, by the Probate Court of Paulding County, Ohio, Judge Cathryn Harrington, sitting by assignment. Reason for removal—failure to properly account for his trust. Respondent also received a copy of the journal entry signed by Judge William L. Day, Probate Court, Paulding County, stating that Petitioner had admitted misuse of the funds of the Estate of Bertha Majors, deceased, and his resignation as administrator had been accepted by the court.

The Ohio State Bar Association employs Martin Hegele as Investigator and John R. Welch as Counsel to the Committee on Legal Ethics and Professional Conduct to make preliminary investigation of all disciplinary matters coming to the attention of the Association. Mr. Hegele made such a routine investigation of Petitioner's activities. He reported his preliminary findings to the Committee on Legal Ethics and Professional Conduct in September 1963. The Committee, considering that a more detailed investigation was indicated, appointed Mr. Thomas R. Spellerberg, Tiffin, Mr. William F. Hecker, Cleveland, Mr. Robert J. Kuhn, Lima and Mr. Welch as the investigating subcommittee. This subcommittee conducted intensive investigation over a period of almost a year. Following a detailed report of that subcommittee, the Committee on Legal Ethics and Professional Conduct recommended to the Executive Committee of the Association that a complaint be filed against Petitioner for unethical conduct. The Executive Committee considered the recommendation and the evidence in support of the complaint and approved it. The

complaint was duly filed. A copy of the complaint was served on Petitioner.

After a complaint is filed with the Board of Commissioners on Grievances and Discipline, the Chairman of that Board is obliged to appoint a panel of three members of that Board, none of whom reside in the Respondent's (Petitioner here) county of residence, to hear the matter. In this instance the Chairman appointed Mr. John R. Py, Chairman of the panel, of Sandusky, Ohio; Mr. Robert F. Driedame, Cincinnati, Ohio and Mr. Fred A. Smith of Toledo, Ohio, and the complaint came on for hearing on May 3, 1965.

The Petitioner was represented before, during and after the hearing by John J. Chester, Columbus, Arthur S. Newcomer and John B. Dwyer, Bryan, all practicing attorneys in Ohio. The hearing in this case consumed two full days. The record consists of 394 pages of testimony by eleven witnesses, and some forty-one exhibits.

The Petitioner had the opportunity to and did cross examine every witness who gave testimony against him at the hearing. It is, therefore, patently false and misleading for Petitioner to say (as he does at page 23 of his petition) that "The Petitioner was never provided with an opportunity, by preliminary hearing or otherwise, to learn who his accusers were." If there was an "accuser" in the sense indicated by Petitioner, it was the Ohio State Bar Association who did and still does confront the Petitioner with charges of unethical conduct. However, it was the witnesses who gave evidence against him and he confronted and cross-examined every witness produced by the Respondent. All this is absolutely clear from the record.

On January 10, 1966, eight months after the hearing, the Board of Commissioners on Grievances and Discipline filed

its written findings of fact and recommendations in the Supreme Court of Ohio and served a copy on Petitioner.

The Board found that Petitioner knowingly commingled substantial trust funds with his personal funds in violation of Canon 11 of the Canons of Professional Ethics and Section 5 (a) of Rule XVIII of the Rules of Practice of the Supreme Court of Ohio, and did further commit the crime of embezzlement as defined in Section 2907.34 of the Revised Code of Ohio, being a crime involving moral turpitude. (Section 5 (a), Rule XVIII, defines misconduct.) The Board recommended that Petitioner be permanently disbarred from the practice of law, pursuant to Section 6 (a), Rule XVIII.

On January 10, 1966, the Supreme Court of Ohio ordered Petitioner to show cause why the recommendation of the Board of Commissioner's should not be confirmed and disciplinary order entered. At this stage in the proceedings, Petitioner may object to the findings of fact by the Board of Commissioners and make his written argument to the Supreme Court of Ohio on law and fact. Such a brief was filed by Petitioner. An Answer Brief was filed by Respondent. On March 8, 1966, the case was orally argued to the Court with one half hour to a side.

On April 27, 1966, the Court announced its decision confirming the report of the Board and rendering judgment disbarring Petitioner. 6 Ohio St. 2d, 128. (The Opinion is printed at page 31 of the Petition.)

We submit that these proceedings before the Supreme Court of Ohio are free from any due process defect. Petitioner was given notice of the charges against him. He was given an opportunity to and did defend himself before the Board of Commissioners of the Supreme Court of Ohio and before the Court itself. Petitioner confronted and cross-

examined every witness who testified against him. He was represented throughout the entire proceedings by competent and prominent counsel of his own selection. Petitioner was given the opportunity to and did present written and oral argument to the Commissioners and to the Supreme Court of Ohio. Procedural due process does not require more.

For the above reason and the following reasons the writ sought here should not be granted.

1. Petitioner has not complied with Rule 23 (1) (f) of this Court. His Petition does not specify the stage in the proceedings and in the court below at which, and the manner in which the federal questions sought to be reviewed were raised; the method of raising them and the way in which they were passed upon by the court.

In fact, with the possible exception of the first question, the seven "Questions Presented" here for review were not presented to the court below.

2. The Petitioner contends that he was denied a trial by an impartial tribunal. He attacks the hearing panel on the ground that they were prominent attorneys, concerned with the enforcement of legal ethics, associated with the bar association which prosecuted him, and that they were not compensated for their services. (Petition pages 8-9.) Petitioner's argument that men of such background must be biased against him merely states his conclusion. He does not point to any evidence in the record or even outside the record which supports his conclusion. And, obviously, the Petitioner does not recognize that there are members of the Bar who believe that they owe some of their time to the upbuilding of the profession to which they belong. Be that as it may, the fatal defect in Petitioner's argument is

that it completely ignores the Ohio law which controls disciplinary proceedings.

Petitioner was not "tried" by the hearing panel. He was "tried" by the Supreme Court of Ohio as that Court has stated on at least two separate occasions.

In *Cleveland Bar Association v. Pleasant* (1958) 167 Ohio St., 325-335, 148 NE 2d 493, cert den 358 U.S. 842, 3 L ed 2d 76, the court said:

> "There can be no question now of the inherent power of this court as to the disciplining of attorneys and, therefore, of its power to provide by rule the procedure in reference to hearings upon such questions. That is all that was contemplated in the establishment of the Board of Commissioners on Grievances and Discipline. Such board or its panels have no power to discipline an attorney, except with reference to a private reprimand, and surely that can not constitute a judgment, for the power to give such a reprimand would be inherent without any authorization by this court. *As to any other disciplinary action, all that the board can do is to investigate and make findings of fact and recommendations, and the only order or decision is made solely by this court.*" (Emphasis added)

To the same effect is *Mahoning County Bar Association v. Ruffalo* (1964) 176 Ohio State 263, 199 NE 2d 396, cert den 379 U.S. 931, 13 L ed 2d 342, where the court said:

> "In cases of this kind, the board of commissioners acts for and on behalf of this court. In doing so, it makes recommendations as to the facts which should be found and the action which should be taken by this court. *However, this court has full responsibility for*

*determining what the facts are and what action should be taken on those facts."*

The Supreme Court of Ohio has determined that Mr. Rekeweg committed acts which violated Canon 11* of the Canons of Professional Ethics of the American Bar Association as approved and adopted by that court. (Rule XIX, Appendix B.) It has also determined that Mr. Rekeweg's misconduct warrants disbarment, and has disbarred him. (Court's opinion, page 31 of Petition.)

The evidence in this case is that Mr. Rekeweg was both fiduciary and attorney in the administration of four decedent's estates. He had complete control of the funds of those estates. As found by the Supreme Court of Ohio:

> "the evidence displayed a course of conduct by respondent of transferring funds from estate or trust accounts and commingling them with his personal account. His excuse was that the funds so transferred were fees. The board found that in some cases there was a complete disparity between the amounts transferred and the total value of the estates to the point that the board could not believe that respondent could conscientiously feel that these amounts could ever be justified as fees."

In one estate the evidence is that the total assets of the estate amounted to $8,012.61; and the undisputed evidence is that over a period of two years Mr. Rekeweg transferred $6,655.00 from his estate account to his personal account. (R. 155, 226, 229.) Mr. Rekeweg's defense was that these

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Canon 11 provides:

* The lawyer should refrain from any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client.

Money of the client or collected for the client or other trust property coming into the possession of the lawyer should be reported and accounted for promptly, and should not under any circumstances be commingled with his own or be used by him.

funds were taken as fees. At the instance of dissatisfied heirs, and after hearing, Mr. Rekeweg was removed as administrator of this estate. He admitted to the court that he had misused funds of the estate and asked for a little time to dispose of some stock to replace the funds taken. (R. 116-325.) Yet, Mr. Rekeweg's defense to the charge that he had misused funds of this estate was that he understood the court to mean that he had taken too much as fees. (R. 160.)

In another estate (Carl Charlie Williams, deceased), the evidence is that Mr. Rekeweg made an out-of-court settlement of a wrongful death claim for $35,000.00. On application by Mr. Rekeweg, the court apportioned this sum $32,500.00 to the next of kin (an illiterate widow and five minor children) and $2,500.00 to decedent's estate for his personal injury. (Rel. Ex. 40.)

On the day that the settlement was approved, Mr. Rekeweg deposited the $35,000.00 in the bank and withdrew $8,750.00 as his fee. Three weeks later, Mr. Rekeweg withdrew an additional $4,750.00 from his fiduciary account and deposited that sum in his personal account. (Had he not done so his personal account would have been overdrawn by $1,298.60.) (Rel. Ex. 9-92.) Mr. Rekeweg did not account to the court for this transfer of funds.

Mr. Rekeweg's defense to the charges of commingling and conversion of those funds was that the $4,750.00 was his fee as administrator and attorney for the estate. (R. 164-165.) But according to Mr. Rekeweg's own account with the court, the total assets of the decedent's estate were $2,875.00: $2,500.00 cash and $375.00 assigned value of decedent's furniture. (Rel. Ex. 4.)

The evidence with respect to the other charges is the same. In all cases, when an issue was raised about Mr.

Rekeweg's transfers from his estate accounts to his personal account, his excuse was that these transfers were fees and he would offer to reimburse the fiduciary accounts.

Misappropriation of funds entrusted to an attorney is a gross violation of general morality as well as professional ethics and is likely to endanger the confidence of the public in the legal profession and in the administration of justice. When an attorney is guilty of habitual misuse of funds of his clients, as in this case, disbarment should be ordered to protect the public and those charged with the administration of justice.

There is no reason to analyze the law presented by the Petitioner in support of his Petition for a Writ of Certiorari. The Petitioner had a full and fair hearing before an imparital tribunal, the Supreme Court of Ohio.

The Ohio State Bar Association respectfully submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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33 West Eleventh Avenue, Columbus, Ohio,
*Counsel for Respondent.*

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that three (3) copies of the foregoing brief have been mailed by first class mail

with postage prepaid to attorneys for Petitioner, Bernard A. Berkman, Larry S. Gordon and Joshua J. Kancelbaum, respectively at their offices located at The Superior Building, Cleveland, Ohio.

/s/ THOMAS R. SPELLERBERG
*Of Counsel for Respondent.*

# APPENDIX A
## RULE XVIII[2]
## DISCIPLINARY PROCEDURE

Pursuant to the powers of this Court over the Bar of this State and the members thereof, this rule is amended, as follows, effective on March 11, 1964, and shall apply to all pending cases.

**(1) Creation of Board of Commissioners on Grievances and Discipline.** There is hereby created as Commissioners of this Court a Board of Commissioners on Grievances and Discipline. Said Board of Commissioners shall consist of seventeen (17) members of the Bar of this Court, appointed by this Court. One member of such Board shall be appointed from each of the following districts: *District 1,* comprising Butler, Clermont, Clinton, Hamilton and Warren Counties. *District 2,* comprising Darke, Miami, Montgomery, Preble and Shelby Counties. *District 3,* comprising Defiance, Fulton, Hancock, Henry, Paulding, Putnam, Van Wert, Williams and Wood Counties. *District 4,* comprising Lucas County. *District 5,* comprising Crawford, Delaware, Marion, Morrow, Ottawa, Sandusky, Seneca and Wyandot Counties. *District 6,* comprising Champaign, Clark, Fayette, Greene, Logan, Madison and Union Counties. *District 7,* comprising Franklin County. *District 8,* comprising Adams, Brown, Gallia, Highland, Jackson, Lawrence, Pickaway, Pike, Ross, Scioto and Vinton Counties. *District 9,* comprising Coshocton, Fairfield, Knox, Licking, Muskingum and Perry Counties. *District 10,* comprising Ashland, Erie, Holmes, Huron, Lorain, Medina, Richland and Wayne Counties. *District 11,* comprising Portage and Summit Counties. *District 12,* com-

[2] Same as former Rule XXVII as amended March 11, 1964.

prising Cuyahoga County. *District 13,* comprising Ashtabula, Columbiana, Geauga, Lake, Mahoning and Trumbull Counties. *District 14,* comprising Carroll, Stark and Tuscarawas Counties. *District 15,* comprising Belmont, Guernsey, Harrison, Jefferson and Monroe Counties. *District 16,* comprising Allen, Auglaize, Hardin and Mercer Counties. *District 17,* comprising Athens, Hocking, Meigs, Morgan, Noble and Washington Counties. The term of office of each member of said Board of Commissioners shall be three (3) years, beginning on January 1 next following his appointment. Provided, however, that any member of the Board whose term has expired and who shall have an uncompleted assignment as a member of a panel shall continue to serve for the purpose of such assignment until it shall have been concluded before the Board of Commissioners, and further provided that his successor commissioner shall take no part in the proceedings of the Board concerning such assignment. Appointments to terms commencing January 1 of any year shall be made prior to December 1 of the preceding year. Vacancies for any cause shall be forthwith filled by appointment by this Court for the unexpired term. The Court shall each year designate one member as Chairman of said Board of Commissioners, and designate a Secretary, each of whom shall have authority to execute journal entries on behalf of the Board of Commissioners and of panels thereof.

**(2) Jurisdiction of Board.** The Board of Commissioners is empowered and charged to receive, entertain, inquire into, take evidence, make findings and submit recommendations to this Court, as hereinafter provided.

(a) concerning complaints of misconduct as hereinafter defined which are alleged to have been committed by an

attorney and counselor at law, person under suspension for an indefinite period from the practice of law, or judge, or

(b) concerning the mental illness of any attorney and counselor at law or judge, or

(c) relating to petitions for reinstatement as an attorney and counselor of law in this State, or

(d) upon reference by this Court of conduct affecting any proceeding under this rule, where the acts allegedly constitute a contempt of this Court but did not take place in the actual presence thereof, whether by willful disobedience of any order or judgment of this Court or the Board of Commissioners, by interference with any officer of this Court in the prosecution of any duty, or otherwise.

**(3) Referral for Investigation.** The Board of Commissioners may refer to the Grievance Committee of the appropriate local bar association or to the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association any matters coming to its attention for investigation, as hereinafter provided.

**(4) Application of Rule; Authority and Duty of Local Committees.** From and after the effective date of this rule, all proceedings with regard to mental illness and complaints and grievances involving alleged misconduct by attorneys and counselors at law and judges; all proceedings for the discipline of such attorneys and counselors at law, persons under suspension for an indefinite period or disbarred from the practice of law, and judges; and all proceedings for reinstatement as an attorney and counselor at law shall be brought, conducted and disposed of in accordance with the provisions of this rule. Any committee authorized

by any regularly organized bar association or by the Ohio State Bar Association shall investigate any matter referred to it or which comes to its attention, and may cause a complaint to be filed pursuant to this rule in cases where misconduct, contempt, or mental illness is found; provided, however, that nothing herein shall affect disciplinary procedures of any regularly organized bar association under the provisions of its constitution not inconsistent with this rule.

The Board of Commissioners or any member thereof, the Chairman of the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association, and the President, Secretary or Chairman of the Grievance Committee of any regularly organized local bar association in the State may call upon any attorney and counselor at law or judge in the State to assist in any investigation or to testify in any hearing before the Board of Commissioners or any panel for which provision is made in this rule, as to any matter as to which he would not be bound to claim privilege as an attorney at law. No such attorney and counselor at law or judge shall neglect or refuse so to assist in any such investigation or so to testify.

**(5) Definitions.**

**(a) Misconduct.** Misconduct shall mean any violation of any provision of the oath of office taken upon admission to practice of law in this State, or any violation of the Canons of Professional Ethics or the Canons of Judicial Ethics as adopted by the Court from time to time, disobedience of the terms of an order imposing a suspension for an indefinite period from the practice of law, or the commission or conviction of a crime involving moral turpitude.

**(b) Mental Illness.** Mental illness shall mean the condition defined in Section 5122.01 (A), Revised Code.

**(6) Manner of Discipline.** Each attorney and counselor at law or judge found guilty of misconduct shall be disciplined. The discipline of such persons shall be

(a) a permanent disbarment from the practice of law, or

(b) suspension for an indefinite period from the practice of law subject only to reinstatement as hereinafter provided, or

(c) a public reprimand, or

(d) a private reprimand.

**(7) Effect of Discipline.** A person disbarred shall never thereafter be readmitted to the practice of law in this State. A person who shall have voluntarily surrendered his license to practice and thereafter has been reinstated in the manner hereinafter provided and a person who has been suspended for an indefinite period from the practice of law and thereafter reinstated in the manner hereinafter provided shall be disbarred upon being found guilty of subsequent misconduct. A person who has been publicly reprimanded for misconduct, upon being found guilty of subsequent misconduct, shall be suspended for an indefinite period from the practice of law or permanently disbarred, depending upon the seriousness of such misconduct.

**(8) The Complaint; Where Filed; By Whom Signed.** A complaint shall mean a formal written complaint alleging misconduct or mental illness of one who shall be designated as the Respondent. Six (6) copies of all such complaints shall be filed in the office of the Secretary of the Board. Such complaint shall not be accepted for filing unless it is signed by one or more members of the Bar of Ohio in good standing (who shall be counsel for the Relator) and

supported by a certificate in writing signed either by the Chairman of the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association or by the President, Secretary or Chairman of the Grievance Committee of any regularly organized local bar association in the State (which association shall be deemed the Relator), certifying that said counsel are duly authorized to represent said Relator in the premises and have accepted the responsibility of prosecuting the complaint to conclusion. Such certification shall constitute a representation that, after investigation, the Relator believes reasonable cause exists to warrant a hearing on such complaint, and shall constitute the authorization of such counsel to represent said Relator in the premises as fully and completely as if designated and appointed by order of the Supreme Court of Ohio with all the privileges and immunities of an officer of such Court. The complaint may also, but need not, be signed by the person aggrieved.

**(9) Duty of the Board Upon Filing of the Complaint.**

**(a) Notice to Respondent.** The Secretary of the Board of Commissioners shall send a copy of the complaint by registered mail to the Respondent with a notice requiring him to file, within twenty (20) days after the mailing of such notice, six (6) copies of his answer and to serve copies thereof upon counsel of record named in the complaint.

**(b) Suspension of Right to Practice Pending Disposition of Misconduct Complaint.** After an answer has been filed or the time for answer has elapsed, the Court shall entertain such recommendation as the Board may make for the immediate suspension from the practice of law pending disposition of the complaint if the complaint alleges the conviction of a crime involving moral turpitude supported

by a certified copy of the judgment entry of the Court convicting the Respondent.

**(c) Mental Illness Suspension.** After an answer has been filed or the time for answer has elapsed, if the complaint or answer alleges mental illness supportd by a certified copy of a journal entry of a court of competent jurisdiction adjudicating mental illness, or if the Board finds existing mental illness after an examination as provided in (d) hereof, the Board shall forthwith certify the complaint to this Court and the Court may suspend the Respondent from the practice of law.

**(d) Examination.** If the complaint or answer alleges existing mental illness unsupported by a journal entry of a court of competent jurisdiction or mental illness is otherwise placed in issue, the Board or panel may, on its own motion or on motion by either party, order a medical or psychiatric examination of Respondent by one or more physicians, designated by the Board or panel, whose findings shall be presented to the Board or panel as evidence and made available to both parties.

**(e) Termination.** Any suspension under this section may be terminated on Respondent's application to the Board and a showing of removal of the cause for the suspension, which is certified by the Board to, and affirmed by, the Court.

**(10) Hearing by Panel of Three Commissioners.** After Respondent's answer has been filed, or the time has expired within which Respondent was required to file such answer, a formal hearing shall be held, upon reasonable notice, by a panel of Commissioners appointed by the Chairman of said Board of Commissioners, who shall designate one member of such panel as chairman of the panel.

Such panel shall consist of three (3) Commissioners, no one of whom shall be a resident of the district from which such complaint originated. A majority of such panel shall constitute a quorum for all purposes.

The Chairman of the panel may have a transcript prepared of the testimony taken at each such formal hearing, and the cost thereof shall be paid by the Secretary of the Board of Commissioners, or taxed as costs.

**(11) Dismissal of Complaint.** If the panel finds that the complaint or evidence is insufficient, the panel shall make its certified report of the proceedings and recommendations to the Board of Commissioners which shall review the proceedings, and shall dismiss the complaint, or refer the matter back to the panel for further hearing or the administering of a private reprimand, or may proceed upon the certified report of the proceedings before the panel. The Secretary of the Board of Commissioners shall give notice of a dismissal to the Respondent, all counsel of record, the Ohio State Bar Association, and the local bar association or associations of the county or counties in which the Respondent resides and maintains his office, and of the county or counties from which the complaint arose.

If a written request for a conference with the Supreme Court of Ohio is made by the Relator within twenty (20) days after the issuance of such notice, Relator, Respondent and a member of the hearing panel will be called to confer with the Court.

**(12) Private Reprimand; Duty of Panel.** If the panel finds and determines that the Respondent is guilty of misconduct and that private reprimand should be administered, such panel shall administer such reprimand and such action shall be reported to the Secretary of the Board of Commissioners, who shall notify the same persons and

organizations that would have received notice if the complaint had been dismissed by such panel.

If a written request for a conference with the Supreme Court of Ohio is made by the Relator within twenty (20) days after the issuance of such notice, Relator, Respondent and a member of the hearing panel will be called to confer with the Court.

**(13) Public Reprimand; Suspension or Permanent Disbarment; Duty of Panel.** If the panel finds and determines that the Respondent is guilty of misconduct and that public reprimand, suspension for an indefinite period, or permanent disbarment is merited, the panel shall make its certified report of the proceedings before it, including its findings of fact and recommendations, and shall file the same, together with the transcript of testimony taken and an itemized statement of the actual and necessary expenses incurred in connection with such proceedings, with the Secretary of the Board of Commissioners.

**(14) Review by Entire Board of Comissioners; Board to Administer Private Reprimand.** Upon review, said Board of Commissioners may refer the matter back to the panel for further hearing or may order a further hearing to be presented before said Board of Commissioners or may proceed upon the certified report of the prior proceedings before the panel. Upon the final review, the Board of Commissioners may dismiss the complaint or find that the Respondent is guilty of misconduct. If the Board of Commissioners determines that a private reprimand shall be administered it shall administer such private reprimand. If the complaint is dismissed, or a private reprimand is administered, such action shall be reported to the Secretary of the Board of Commissioners, who shall notify the same persons and organizations that would have received

notice if the complaint had been dismissed by the panel that heard the matter.

**(15) Public Reprimand; Suspension or Permanent Disbarment; Duty of Board After Review.** If the Board of Commissioners determines that a public reprimand, suspension for an indefinite period from the practice of law or permanent disbarment is merited, said Board of Commissioners shall thereupon make a final certified report of such proceedings, including its findings of fact and recommendations, and shall file the same, together with the transcript of testimony taken and an itemized statement of the actual and necessary expenses incurred in connection with such proceedings, in the office of the Clerk of this Court, and shall forthwith notify the Respondent and all counsel of record of such action, enclosing with such notice a copy of the findings of fact and recommendations and a copy of the statement of the actual and necessary expenses incurred.

**(16) Show Cause Order Issued by the Court to Respondent.** On the filing of such final report of the Board of Commissioners, this Court shall issue to the Respondent an order to show cause why the report of said Board of Commissioners shall not be confirmed and a disciplinary order entered. Notice of the order to show cause shall be served by the Clerk of this Court on the Respondent and all counsel of record, personally or by registered mail.

**(17) Response to Order to Show Cause and Objections.** The Respondent or Relator within twenty (20) days after the issuance of an order to show cause may file objections to the findings or recommendations of the Board of Commissioners and to the entry of a disciplinary order or to the confirmation of the report on which the order to show cause was issued, and a brief in support of such objections, to-

gether with proof of service of copies thereof on the Secretary of the Board of Commissioners and on all counsel of record. All objections and briefs shall be filed in the number and form required by rules of this Court for original actions.

**(18) Answer Briefs.** Answer briefs together with proof of service shall be filed within fifteen (15) days after briefs in support of objections have been filed. All briefs shall be filed in the number and form required by rules of this Court for original actions.

**(19) Review by Court; Reimbursement for Expenses of Board; Duty of Clerk on Entering Order.** After hearing on objections, or, if objections are not filed within the prescribed time, this Court shall enter such order as it may find proper, which may include provision for reimbursement of costs and expenses incurred by the Board of Commissioners. Upon the entry of any disciplinary order pursuant to this rule, the Clerk of the Court shall mail certified copies thereof to counsel of record, to the Board of Commissioners, to Respondent (at his last known address), to the Ohio State Bar Association, to the local bar association or associations in the county or counties in which the Respondent resides and maintains his office and the county or counties from which the complaint originated, to the Presiding Judge of the Court of Common Pleas for such county or counties, and to the Presiding Judge of the United States District Courts in Ohio; the United States Court of Appeals for the Sixth Circuit; and to the Supreme Court of the United States.

If a disciplinary order of the Court provides for a public reprimand, the Clerk of this Court shall arrange for publication thereof in the Ohio Bar publication of the Ohio

State Bar Association and in a publication, if any, of the Relator local bar association.

If a displinary order of the Court provides for a permanent disbarment or suspension for an indefinite period from the practice of law, the Clerk of this Court shall arrange for publication thereof in the official reports of this Court, in the Ohio Bar publication of the Ohio State Bar Association and in a publication, if any, of the Relator local bar association.

**(20) Proceedings Private; Exceptions.** All proceedings and documents relating to complaints and hearings thereon and proceedings in connection therewith shall be private except

(a) Where the Respondent shall request in writing that they be public, or

(b) Where proceedings filed with the Supreme Court of Ohio recommend the discipline of permanent disbarment or suspension for an indefinite period, or

(c) Where any disciplinary matter is heard by the Supreme Court of Ohio, other than in conference, on objections to the findings or recommendations of the Board of Commissioners.

(A copy of the findings, recommendations and actions of the Panel and the Board of Commissioners in each case shall be given to any member of the Court upon request.)

**(21) Petition for Reinstatement.** No petition for reinstatement to the practice of law shall be entertained by this Court and the same may not be filed in this Court, within a period of two (2) years after the entry of an order suspending for an indefinite period the Petitioner from the practice of law in this State, or within a period

of two (2) years after the denial of a petition for reinstatement to the practice of law filed by such Petitioner.

**(22) Contents of Petition for Reinstatement.** Subject to the foregoing restrictions, any person who has been suspended for an indefinite period from the practice of law and who wishes to be reinstated may file his verified petition and twenty (20) copies thereof with the Clerk of this Court, setting forth

(a) the date when such suspension was ordered, and if there was a reported opinion, the volume and page of the official reports of this Court where such opinion appears;

(b) the dates all such prior petitions for reinstatement were filed, denied or granted;

(c) the names of all persons and organizations, except the Petitioner and the Board of Commissioners, who were, or would be, entitled, under this Rule, to receive from the Clerk of this Court certified copies of the disciplinary order of this Court against Petitioner resulting in his suspension; and the name of the local bar association or associations in the County in which he resides at the time of the filing of the petition and of each County in which he proposes to maintain an office if reinstated; and

(d) the facts upon which he relies to establish by clear and convincing evidence that he possess all the qualifications, mental, educational and moral, which would have been a requirement of an applicant for admission to the Bar of Ohio at the time of his orignial admission, and that he is now a proper person to be readmitted to the Bar of Ohio, notwithstanding the previous disciplinary action taken against him.

**(23) Costs to be Deposited with Petition for Reinstatement.** Such petition shall be accompanied by a deposit in

an amount to be fixed by the Clerk, for probable costs and expenses to be incurred in connection with said proceedings, which shall include any amounts unpaid under any prior order of this Court.

**(24) Requisites for Reinstatement.** No person shall be reinstated unless he has established by clear and convincing evidence that he possess all the qualifications, mental, educational and moral, which would have been a requirement of an applicant for admission to the Bar of Ohio at the time of his original admission, and that he is now a proper person to be readmitted to the Bar of Ohio, notwithstanding the previous disciplinary action taken against the Petitioner. In such case the order of reinstatement may be conditioned upon the Petitioner's subsequently taking and passing a regular bar examination of this Court and thereafter taking the prescribed oath of office.

Paragraphs C and D of Section 6 of Rule XVII shall not apply to any petitioner with respect to whom such an order for reinstatement may have been issued.

**(25) Petition for Reinstatement Referred to Board of Commissioners.** Unless denied forthwith for insufficiency in form or substance, the Clerk shall forward five (5) copies of the petition to the Secretary of the Board of Commissioners and such petition shall be deemed to be referred, without court order, to the Board of Commissioners to hold a hearing or hearings, and take and report evidence relevant to the rehabilitation of the Petitioner and his possession of all the qualifications, mental, educational and moral, required of an applicant for admission to the Bar of Ohio at the time of his original admission.

**(26) Hearing of Petition by Panel of Three; Hearing Shall Be Public; Who May Appear; Appeal to Court from**

**Denial of Petition by Board of Commissioners.** The Chairman of the Board of Commissioners shall appoint a hearing panel of three (3) Commissioners no one of whom shall be a resident of the district in which the Petitioner resides or of the district in which he resided at the time of his suspension and said panel shall conduct a hearing or hearings upon such petition. Reasonable notice of any hearing shall be given to the Petitioner or his counsel and to all persons or organizations referred to in Section (22) (c). Such hearing shall be public. Any interested person, any member of the Bar, and any representative of any local bar association or of the Ohio State Bar Association may appear before the hearing panel in support of or in opposition to the petition.

The hearing panel shall make and certify a report of the proceedings before it, including its findings of fact and recommendations, to the Board of Commissioners; and all proceedings before such panel and the Board of Commissioners shall, whenever appropriate, be governed by the provisions hereinbefore contained governing disciplinary proceedings, including proceedings in this Court or an issuance of an order to show cause why the final report of the Board of Commissioners should not be confirmed.

The Board, in its discretion, may recommend that the Petitioner be required to take and pass one of the regular bar examinations as a condition to readmission. If the final report should recommend denial of the petition, the Petitioner shall have ten (10) days from receipt of notice of the date of filing such report to file objections thereto and brief in support thereof.

If the final report should recommend granting of the petition any person or organization referred to in Section (22) (c) shall have ten (10) days from the receipt of notice of filing of such report to file objections to the recommenda-

tions and brief in support thereof. The Court shall thereupon enter an appropriate order, which may include such provisions for reimbursement of the costs and expenses incurred in connection with the proceedings as the Court shall deem just.

**(27) Manner of Service of Notices, etc.** Whenever provision is made for the service of any notice, order, report or other paper or copy thereof upon any Respondent or Petitioner in connection with any proceeding involving a complaint or a petition for reinstatement, service may be made upon counsel of record for such Respondent or Petitioner, either personally or by registered mail.

**(28) Quorum of Panel or Board.** A majority of the members of the Board of Commissioners or of a hearing panel shall constitute a quorum for all purposes and the action of a majority of those present comprising such quorum shall be the action of the Board of Commissioners or of such hearing panel.

**(29) Clerk Is Agent for Service of Notices on Nonresident Attorney.** Any nonresident of this State, having been admitted as an attorney and counselor at law by the rules of this Court, or any resident of this State, having been admitted as an attorney and counselor at law by the rules of this Court, who subsequently becomes a nonresident or conceals his whereabouts, by such admission to the practice of law within this State makes the Clerk of this Court his agent for the service of any notice provided for in any proceeding instituted before the Board of Commissioners against such attorney and counselor at law or judge, pursuant to this Rule.

**(30) Manner of Service on Clerk; Record of Such Service Not a Public Record.** All such notices shall be served by the

Secretary of the Board of Commissioners upon the Clerk of this Court by leaving at the office of said Clerk a true and attested copy of such notice and any accompanying document and by sending to the Respondent, by registered mail, postage prepaid, return receipt requested, a like, true and attested copy, with an endorsement thereon of the service upon said Clerk of this Court, addressed to such Respondent at his last known address. The postmaster's receipt for the payment of such registered postage shall be attached to and made a part of the return of service of such notice by the Secretary. The panel or Board of Commissioners or Court before which there is pending any proceeding in which notice has been given as provided in this section may order such continuance as is necessary to afford the Respondent reasonable opportunity to appear and defend. The Clerk of this Court shall keep a record of the day and hour of the service upon him of such notice and any accompanying document, which shall not be a public record in the office of said Clerk.

**(31) Power to Issue Subpoenas.** In investigations and proceedings under this rule, upon application by the Chairman, Vice Chairman, Secretary, or Counsel of the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association, or by the President, Secretary or Chairman of the Grievance Committee of any regularly organized local bar association in the state authorized to sign a certificate under Section (8) hereof, or by the Respondent or Relator, each member of the Board of Commissioners and its Secretary shall have power to issue subpoenas and to cause testimony to be taken under oath before the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association, or any sub-committee thereof, or before the Grievance Committee of any regularly organized local bar association in the State, or before

a hearing panel of the Board of Commissioners. All such subpoenas shall be issued in the name and under the seal of this Court and shall be signed by a member of the Board of Commissioners or its Secretary and served as provided by statute.

**(32) May Order Depositions.** The Secretary of the Board of Commissioners may order testimony of a witness to be taken by deposition within or without this State in the manner prescribed for the taking of depositions in civil actions, and such depositions may be used to the same extent as permitted in civil actions.

**(33) Effect of Refusal to Testify.** The refusal or neglect of the person subpoenaed as a witness to obey a subpoena, to attend, to be sworn or to affirm, or to answer any proper question shall be deemed to be contempt of this Court and shall be punishable accordingly.

**(34) Rules of Evidence.** All rules of evidence shall be observed in the conduct of all hearings, and the Respondent may be represented by counsel, who shall enter formal appearance.

**(35) Docket of Complaints.** The Secretary of the Board of Commissioners shall keep a docket of each complaint and of all proceedings thereon, which shall be retained permanently as a part of the records of his office.

**(36) Board May Prescribe Rules.** The Board of Commissioners may, subject to the prior approval of this Court, adopt other rules and regulations not inconsistent herewith.

**(37) Rule to be Liberally Construed.** The process and procedure under this Rule and other regulations approved by this Court shall be as summary as reasonably may be. Amendments to any complaint, notice, answer, objections, report or order to show cause may be made at any time

prior to final order of the Court. The party affected by such amendment shall be given reasonable opportunity to meet any new matter presented thereby. No investigation or procedure shall be held to be invalid by reason of any non-prejudicial irregularity or for any error not resulting in a miscarriage of justice. This Rule and such regulations relating to investigations and proceedings involving complaints of misconduct and petitions for reinstatement shall be liberally construed for the protection of the public, the Courts and the legal profession and shall apply to all pending investigations and complaints so far as may be practicable, and to all future investigations, complaints and petitions whether the conduct involved occurred prior or subsequent to the amendment of this Rule. To the extent that application of this amended Rule to such pending proceedings may not be practicable, the rules and regulations in force at the time this amended Rule became effective shall continue to apply.

## APPENDIX B
## RULE XIX[3]
## RULES OF PROFESSIONAL CONDUCT

**Section 1.** These rules of professional conduct shall be binding upon all members admitted to practice law in the State of Ohio, and the wilful breach thereof shall be punished by reprimand, by suspension or by disbarment, as provided in Rule XVIII of the Rules of Practice.

The Canons of Professional Ethics and the Canons of Judicial Ethics of the American Bar Association as amended are adopted; and nothing in these rules is intended to limit or supersede any provision of law relating to the duties and obligations of attorneys or the consequences of a violation thereof. (The Canons of Professional Ethics were adopted November 13, 1952, and are set forth in 175 Ohio State Reports. The Canons of Judicial Ethics as amended were adopted January 27, 1954, and are set forth in 160 Ohio State Reports.)*

**Section 2.** An attorney at law shall not advertise or otherwise solicit professional employment. This rule shall not apply to the publication or use of ordinary professional cards or conventional listings in legal directories and newspapers.

**Section 3.** An attorney at law shall not employ another to solicit or to obtain or remunerate another for soliciting or obtaining professional employment for him.

**Section 4.** An attorney at law shall not acquire an interest adverse to a client in a subject matter concerning which the attorney has been employed.

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[3] Same as former Rule XXVIII.

* Canons of Professional and Judicial Ethics are set forth also in 176 Ohio State Reports.

**Section 5.** An attorney at law shall not, directly or indirectly, without the consent of his client, purchase property at a probate, foreclosure or judicial sale in an action or proceeding in which he appears as attorney for a party.

**Section 6.** An attorney at law shall not represent conflicting interests except with the consent of all parties concerned.

**Section 7.** An attorney at law shall not accept professional employment without first disclosing to his prospective client his relation, if any, with the adverse party, and his interest, if any, in the subject matter of the employment.

**Section 8.** An attorney at law shall not accept employment adverse to a client or former client relating to a matter in reference to which he has obtained confidential information by reason of and in the course of his employment by such client or former client.

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# In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 648. 684

WILBER D. REKEWEG,
*Petitioner,*

v.

OHIO STATE BAR ASSOCIATION,
*Respondent.*

## REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

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# In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 648.

WILBER D. REKEWEG,
*Petitioner,*

v.

OHIO STATE BAR ASSOCIATION,
*Respondent.*

## REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

### I. The Federal Constitutional Questions Urged by the Petitioner Were Sufficiently Raised in the Court Below:

Respondent urges that with the "possible exception of the first question" the questions raised by the petition for certiorari in this disbarment case were not presented to the court below.[1] In this section of his reply brief, petitioner will refute this contention specifically with respect to each of the points urged in the petition. However, several general considerations are applicable to all points. First, it must be remembered that this action was initiated in the Supreme Court of Ohio upon recommendations and

[1] Respondent's Brief in Opposition to Petition for a Writ of Certiorari (hereinafter designated "Respondent's Brief") p. 6.

findings of that court's Board of Commissioners on Grievances and Discipline. In theory, as respondent recognizes,[2] the petitioner was not "tried" by the hearing panel whose recommendations and findings were submitted to the Court.[3] Accordingly, matters which were urged in the Supreme Court of Ohio were presented at the earliest stage at which legal questions could be presented. Secondly, petitioner sought dismissal before the panel upon broad constitutional objections (R. 375). Third, it is unnecessary for petitioner to adhere strictly to the language, theories or arguments which he advanced in support of the issues in the state courts.[4]

**Question I.** This question deals with the violation of petitioner's right to a trial by an impartial tribunal. Petitioner urged violation of his constitutional rights because of the inherent bias of the panel at the commencement of the hearing (R. 5-7). The issue of inherent bias violative of petitioner's due process rights was also specifically argued in the initial brief filed by him as respondent in the Supreme Court of Ohio.[5]

**Question II.** This question seeks broad recognition that disbarment proceedings are criminal trials for Sixth and Fourteenth Amendment purposes and encompasses Questions III through VII, inclusive. Petitioner urged the

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[2] Respondent's Brief, p. 7-81.

[3] *Cleveland Bar Association v. Pleasant*, 167 Ohio St. 325-335, 148 N. E. 2d 493, cert. den. 358 U. S. 842 (1958); *Mahoning County Bar Association v. Ruffalo*, 176 Ohio St. 263, 199 N. E. 2d 396, cert. den. 379 U. S. 931 (1964).

[4] *Dewey v. Des Moines*, 173 U. S. 193, 197-198 (1899); *Terminiello v. Chicago*, 337 U. S. 1, 5 (1949); *id.* at 7 (dissenting opinion).

[5] Brief of Respondent in the Supreme Court of Ohio, pp. 11-17.

applicability of the constitutional protections afforded in criminal cases in his brief in chief[6] and in his brief in support of his motion for rehearing.[7]

**Question III.** This question deals with the validity of a mere preponderance of evidence as a standard of proof in Ohio disbarment proceedings. While petitioner did not specifically object to the standard of proof, this objection is included and implicit in his broad assertion that he was denied the due process available to accused persons in criminal cases as described in the preceding paragraph.

**Questions IV and V.** These questions consider whether disbarment for commingling and embezzlement of estate funds solely upon proof of unconcealed appropriations of funds for fiduciary and attorney fees violates due process of law and the right to be informed of the nature and cause of the accusation against the petitioner. In his brief in the court below, petitioner urged that he could not lawfully be convicted of these offenses where the funds were taken in good faith under claim of right.[8] He also argued on motion for rehearing, that he had a constitutionally protected right to be disbarred only upon proof of "moral or professional delinquency."[9] These arguments sufficiently raised the question of absence of convicting evidence in a federal constitutional context.

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[6] Brief of Respondent in the Supreme Court of Ohio, p. 16.

[7] Motion for Rehearing and Brief in Support, pp. 1, 3, 6-7. This sixteen page motion and brief, as filed, is not paginated. Page references given herein refer to pages in the sequence in which they appear.

[8] Brief of Respondent in the Supreme Court of Ohio, p. 20.

[9] Motion for Rehearing and Brief in Support, p. 6, quoting from *Ex Parte Garland*, 71 U. S. 333, 379.

**Question VI.** Question VI considers violation of the Sixth and Fourteenth Amendments arising from denial to petitioner of the opportunity to confront his accusers. This argument was precisely urged before the Supreme Court of Ohio on motion for rehearing.[10]

**Question VII.** This question considers whether permanent disbarment of an attorney for commingling or embezzlement of funds from estate accounts by making unconcealed transfers to his personal account constitutes cruel and unusual punishment, particularly in the absence of prior disciplinary action. This argument was urged in the Supreme Court of Ohio in petitioner's initial brief, in which he contended that:

> "to disbar an attorney who has practiced law for more than a quarter of a century without a previous private or public reprimand constitutes either lack of due process or cruel and unusual punishment or both." [11]

Moreover, since petitioner could not have known the severity of his punishment until the Supreme Court of Ohio sentenced him at the conclusion of the proceedings below, this proceeding for a writ of certiorari was petitioner's first effective opportunity to raise this question.

For the reasons set forth above, petitioner contends that every question presented to this Court was adequately raised in timely fashion.

## II. The Inherent Bias of the Hearing Panel Significantly Affected the Ruling Below.

Respondent's assertion that petitioner should have presented evidence from the record in support of his "conclusion" that the hearing panel must have been biased [12]

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[10] Motion for Rehearing and Brief in Support, pp. 1, 3.

[11] Brief of Respondent in the Supreme Court of Ohio, p. 16.

[12] Respondent's Brief, p. 6.

misses the thrust of petitioner's argument—namely that prejudice is inherent and must be presumed from the composition of the panel's membership,[13] a group of uncompensated prominent attorneys with personal histories of connection with enforcement of discipline in the state bar and with membership in the prosecutorial bar association.

Respondent also alludes to the limitation upon the grievance board's power to enforce its findings and recommendations, arguing that since the Ohio Supreme Court, and not the board, tried the petitioner, the board's prejudice is of no consequence. However, the board is required by rule of court to submit its findings and recommendations to the court.[14] Presumably the court requires such findings and recommendations because it intends to use them. Moreover, while the court below was not bound to accept the board's recommendation, as pointed out in the petition for certiorari,[15] it gave great weight to the board's findings in this case, as demonstrated by the content of its opinion. The opinion below, after reciting several of the board's conclusions and its recommendation, ruled that the findings were "supported by the evidence" [16] and "its recommendation * * * warranted." [17] The court "therefore" ruled that "the report of the board is confirmed * * *." [18] In view of the court's attitude toward the board's product, the bias of the panel members can hardly be regarded as unimportant.

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[13] *Cf. Tumey v. Ohio*, 273 U. S. 510 (1927); *Sheppard v. Maxwell*, 384 U. S. 333 (1966).

[14] Rule XVIII (13) Rules of Practice of the Supreme Court of Ohio.

[15] p. 11.

[16] Petition for certiorari, Appendix A, p. 32.

[17] *Ibid.*

[18] *Ibid.*

## III. The Evidence Does Not Establish Moral Delinquency.

This reply brief will not repeat the analysis of evidence contained in the petition for certiorari. However, the recital of facts contained in the respondent's opposing brief[19] must be placed in context. In general, the only evidence offered by the respondent related to the fact of the transfers of funds. The interpretation of why the petitioner made such transfers was left to a biased panel which chose to adopt the respondent's view of the case. Moreover, that view of the case is unsupported by the record. For example, the alleged admission by the petitioner that he had misused estate funds was denied by him and contradicted by the record (R. 161, 325),[20] which discloses only that he had agreed to return a portion of a fee (*Ibid.*).

With respect to the first estate referred to in the respondent's brief,[21] the $6,655.00 received by the petitioner included compensation for services to the beneficiaries involving extensive successful litigation and negotiations for the recovery of property (R. 155-58).

In the other estate described by the respondent[22] the Bar Association's case rests upon the principle that the wrongful death proceeds of $35,000.00 may not be included in the computation of administrator's and counsel's fees for the administration of the estate.[23] Whether or not this position is technically correct, there is no question but that the amounts were claimed as fees; and to disbar an attorney for retaining a total of $13,500 in fees for a

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[19] Respondent's Brief, pp. 8-11.

[20] References designated with the prefix "R" refer to pages in the transcript of the proceedings before a panel of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio.

[21] Respondent's Brief, pp. 8-9.

[22] See Respondent's Brief, p. 9.

[23] *Ibid.*

$35,000 wrongful death recovery and the administration of an estate including that sum seems particularly harsh.

In each other estate, the amounts retained by the petitioner also reflected extensive services.[24]

In summation, the record is not such as to justify the conduct of the court below either in terms of due process or the Eighth Amendment's prohibition against cruel and unusual punishments. Nor is the record such as to palliate the consequences of trial by an inherently prejudiced tribunal.

## CONCLUSION.

For the foregoing reasons, the petitioner urges that the Court grant his petition for certiorari in this case.

Respectfully submitted,

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[24] See petition for certiorari, p. 6.